

**RETHINKING THE RELATIONSHIP BETWEEN LAW,
GENDER JUSTICE AND TRADITIONS IN INDIA:
FROM HOSTILITY TO HARMONY**

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CONTENTS

Chapter	Title	Page No.
Chapter One	Introduction- Emerging Concern for Traditions in Rights Discourses: A Bane or Boon?	1
1.1	Defining the Problem: Changing Nature of Socio-Legal Discourses in India- Emerging Concern for Cultural and Legal Diversity	1
1.2	Emerging concern to Rethink the Relationship between Gender Justice and Cultural and Legal Diversity: An International Phenomenon	8
1.3	Aims and Scope of the Study	26
1.4	Chapterisation	33
1.5	Methodology	46
Chapter Two	Relationship between Law, Social Change and Traditions: Colonial Era Framework	49
2.1	Colonial Rule, Non-Western Societies and the Notion of Progress	50
2.2	India a Prototype of Non-western Societies	56
2.3	Religious Tolerance: A Mainstay of Colonial Policies	59
2.4	Policy of Non-Interference: Means for Exercising Tolerance	61
2.5	Policy of Non-Interference: Cause for Misconceptions	64
2.5.1	The Concepts of Cosmic Order and Dharma: Sources of Cultural and Legal Pluralism in India	68
2.5.1.1.	The Concept of <i>Dharma</i>	70
2.5.1.2.	Dharma as an Inherently Plural Entity	71
2.5.1.3.	Dharma: Neither Law nor Religion	76
2.5.2	Family: A Resort in Spiritual Journey of Life	79
2.5.3	Marriage: A Pluralistic Institution and A Timeless, Eternal Yet a Dissoluble Union	81
2.5.4.	Economic Entitlements: Means to Serve Inter-connectedness	88
2.6	Context of Colonial Rule: Compulsions to Ignore Sources of Pluralism	93
2.7	Undesirable Consequences of the Colonial Rule	100

Chapter	Title	Page No.
	2.7.1. 'Religious' labelling of diverse communities as 'Hindus'	101
	2.7.2. Shift in Centre of Activity from Community/group to the State	101
	2.7.3. Passive submission of groups/ communities/ people to the authority of Scriptures or written texts	102
	2.7.4. Submission of different communities to power of <i>Brahmins</i>	103
	2.7.5. Subsumption of Diversity to Idealistic Norms	103
	2.7.6. Replacement of Flexible and Situation Specific Judgements for 'Appropriateness' with Fixed and Certain Rules	104
2.8	Emergence of New Understandings of Hindu Law, Hindu Marriage and Hindu Family	105
	2.8.1 Restricted Definition of Hindu Marriage	105
	2.8.2 Hindu Marriages Rendered a Permanent Indissoluble Union: Ignorance of Customary Divorces	107
	2.8.3 Hindu Women Denied Right to Own Property	108
2.9	Relationship between Law, Gender Justice and Traditions: Impact of Colonial Distortions	110
Chapter Three	Relationship between Law, Traditions and Rights of Women in Post-Independence India: From Pre-1990s to Post-1990s Framework	117
3.1	The Pre-1990s Phase	119
	3.1.1 Colonial Rule: A Beneficial Legacy	119
	3.1.2 Awareness about Limitations of the State in dealing with Diversity in India	123
	3.1.3 Continuing Influence of Cultures on Law: Not a Reason to Rethink Antagonism between Law and Cultural Diversity	125
3.2	Post-1990s Framework: New Understandings	130
	3.2.1 Changed Perceptions about the Impact of	130

Chapter	Title	Page No.
	Colonial Rule: Colonial Rule- Not a Beneficial Legacy for Women	
3.2.2	Changed Perceptions about Law and Legal Uniformity	138
3.2.2.1	Law and Legal Uniformity- Instruments of Oppression	138
3.2.2.2	Law as a Culturally Embedded, Plural Entity	141
3.2.2.3	New Understanding of the Concept of Personal Laws	143
3.2.2.4	New Understanding about Legal Developments in India: Family Laws Not Moving on the Linear Path of Progress	145
3.3	New Concerns	147
3.3.1	Scholarly Attempts to Rethink the Relationship between Law, plurality and feminism	147
3.3.2	Rethinking the Relevance of the Uniform Civil Code for the Cause of Women's Rights	152
3.4	Emerging Changes in Women's Rights Scholarship in India: A Bane or Boon?	157
3.4.1	Emerging Changes and Divergence in Feminist Legal Scholars' Views	157
3.4.2	Increasing Scholarly disillusionment with the State and its Legal System: From Scepticism to Acceptance	160
Chapter Four	Changing Perceptions towards the Relationship between Law, Traditions and Rights of Women: Important but Insufficient Efforts in the New Direction	170
4.1	Unchanging Nature of socio-legal discourses in India: Persisting Hostility towards Cultural and Legal Pluralism	172
4.1.1	The Concept of Ancient Tradition: Merely a Colonial Construct to Perpetuate Denial of Rights to Women	172

Chapter	Title	Page No.
	4.1.2 Institution of Family: A Site for Oppression of Women	180
	4.1.3 Law- A Process to Eradicate Cultural Diversity	191
	4.2 Concern for plurality: Merely an ‘ornamental Concern’	200
	4.3 Institutions of Marriage and Monogamy in India- Merely Instruments to Impose Oppressive Ideal of Hindu Marriage!	204
	4.4 The Protection of Women from the Domestic Violence Act 2005: A New Source for denial of rights to women	212
	4.5 Emerging Concern for Plurality: A Reason for Crisis in Women’s Rights Scholarship	226
	4.6 Post-1990s Framework: An Instance of Increasing Politicisation of Rights to Women	228
Chapter Five	Conclusion	233
	Rethinking Relation between Law, Gender Justice and Traditions: Some Essential Steps	
	5.1 Need for Looking Beyond the Category- ‘Non-Western Traditions’	235
	5.2 Revisiting the Current Ways of Understanding the distinctions between Tradition and Modernity	241
	5.3 Sensitivity towards Indigenous Traditions: Implications for Rights Discourses in India	250
	BIBLIOGRAPHY	264

Chapter One

Introduction- Emerging Concern for Traditions in Rights

Discourses: A Bane or Boon?

1.1 Defining the Problem: Changing Nature of Socio-Legal Discourses in India- Emerging Concern for Cultural and Legal Diversity¹

Socio-legal discourses in India, especially those concerned with rights of women in the domain of family, have undergone tremendous changes during the past few decades.² One of the most significant changes is: scholars' changed understanding about the role of law, Uniform Civil Code (UCC) and legal pluralism in women's empowerment, especially in the domain of family.³ An important aspect of the above change is: scholars' changed stance towards pluralistic laws that govern family matters of different communities⁴ and all those customs, practices and diverse ways of organizing personal, intimate relationships which have been part of Indian social

¹ This dissertation draws upon Chicago Style of Referencing for citations. It mainly refers to 17th ed. of the Chicago Manual, with slight modifications, especially in using 'ibid.' While in its 17th edition Chicago manual discourages use of the term *ibid.* or *ibidem.* this document has used *ibid.* when a subsequent note refers to the same author and work. http://www.chicagomanualofstyle.org/tools_citationguide.html.

² For a comprehensive account of such changes see Supriya Akrekar, "Theory and Practice of Women's Movement in India- A Discourse Analysis," *Economic and Political Weekly*, Theory and Practice of Women's Movement in India, 30, no. 17 (1995): 2–23.

³ While an important shift can be observed in women and law scholarship in the recent past, it is actually scholars from disciplines other than law, such as historians, political scientists, sociologists, who have played an important role in initiating important changes in socio-legal scholarship in India. Some oft cited examples from other disciplines are: Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India," *Cultural Critique* 7 (1987): 119–56; Sudhir Chandra, *Enslaved Daughters: Colonialism, Law & Women's Rights* (Delhi: Oxford University Press, 1998); Maitrayee Chaudhuri, ed., *Feminism in India: Issues in Contemporary Indian Feminism* (London; New York: Zed Books Ltd, 2005). Among legal scholars in India pioneers of change have been: Ratna Kapur and Brenda Cossman, *Subversive Sites Feminist Engagements with Law in India*, 1 edition (New Delhi; Thousand Oaks, Calif: SAGE Publications Pvt. Ltd, 1996).; Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press, 2001) ; Madhu Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family* (Delhi: Partners for Law in Development, 2010), http://www.academia.edu/15497286/Rights_in_Intimate_Relationships.

⁴ For the purposes of regulation of family matters population in India, since advent of colonial rule, is divided into four broad categories- Hindus, Muslims, Christians and Parsis, with different sets of laws for each of the category, such as, Hindu Law, Muslim Law, Christian Law and Parsi Law. All the communities are governed by a combination of codified laws and customary laws. A commonly used term for family laws of different communities is personal laws.

and cultural fabric since ages, but which came to be considered as backward and regressive since the advent of colonial rule in India.⁵

Women's rights scholars in India, till 1990s, advanced two main ideas, firstly that religion-based 'personal laws' and various customary, pluralistic ways of organising personal relationships were major obstacles in the way of women's march towards dignity, equality and empowerment. Secondly, that these laws and practices were best eradicated through the instruments of the state and its legal system through a uniform set of laws to govern personal relationships of all communities. Basically, the argument has been that legal pluralism and influence of religion on family laws have been the main causes for denial of rights to women and that women's empowerment requires that the family laws in India should be harmonized by promulgating a Uniform Civil Code, which would regulate all family matters irrespective of religion, caste or community.⁶ Pluralistic, religion-based personal laws and customs for formation and dissolution of personal relationships were found problematic as they, on the one hand, were believed to be the main reasons for denial of equal rights in family.⁷ On the other hand, they were seen to encourage what were perceived as anti-women practices such as bigamy (or polygamy) and adultery believed to be imposed on women by a male-dominated, patriarchal society. As a consequence, imposition of monogamy through uniform family laws (in other words, the uniform civil code strategy) or by way of criminal sanctions were, at that time (mainly till late 1990s), perceived as progressive steps for saving women from primitive androcentric practices.⁸

⁵ Most common examples of such practices are bigamy, adultery, child marriages, as well as range of customary (informal) ways of solemnizing marriages and divorces in different communities. While Hindu Marriage Act, 1956 made polygamy as invalid, Indian Penal Code, 1860 also makes bigamy and adultery as criminal offences. A legal attempt to control Child Marriages was made through the Child Marriages Restraint Act, 1929. The above Act is repealed by the Prohibition of the Child Marriages Act, 2006.

⁶ The women and law literature till late 1980s and early 1990s explicitly reflected this view. One of the most important and representative example of this dominant view is: "Towards Equality: Report of the Committee on the Status of Women in India" (New Delhi: Government of India, Ministry of Education and Social Welfare, Department of Social Welfare, 1974).

⁷ Amongst legal scholars an important proponent for transferring complete control of regulating family matters has been: Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi; Newbury Park, Calif: SAGE Publications Pvt. Ltd, 1992).

⁸ "Towards Equality." At pp. 104-110.

A singular form of family based on monogamy, with equal legal rights for men and women, was seen as a means to restrict freedom of men from establishing multiple intimate relationships. At the same time, it was depicted as a way to move Indian family laws on a path of progress which was presumed to have been followed by the West, thereby empowering women by granting them equal social and economic rights. While regulating polygamy and promulgation of the Uniform Civil Code remains an important demand in India,⁹ socio-legal scholars, in recent years, have become divided on the issue.¹⁰ Since the 1990s, social scientists, including legal scholars, have begun to argue that the UCC or the idea of transferring control of family relationships, especially of marriage and divorce, to the State is not necessary for women's empowerment.¹¹

⁹ Pratap Bhanu Mehta, "Not Majority vs Minority," *The Indian Express*, September 6, 2016, <http://indianexpress.com/article/opinion/columns/triple-talaq-islam-muslim-law-board-supreme-court-muslim-wife-divorce-3015345/>; Varun srinivasan, "Need for a United or Unified Code? Understanding the Implications of the Uniform Civil Code," *Live Law*, July 10, 2016, <http://www.livelaw.in/need-united-unified-code-understanding-implications-uniform-civil-code/>; Mukul Kumar Mishra, "Uniform Civil Code: Not to Divide by Religion, but to Unite by Nationality," *www.oneindia.com*, July 15, 2014, <http://www.oneindia.com/feature/uniform-civil-code-not-divide-religion-but-unite-nationali-1483112.html>; S. Sanal Kumar, "Uniform Civil Code or 'Unilateral Civil Code,'" *Live Law*, July 15, 2016, <http://www.livelaw.in/uniform-civil-code-unilateral-civil-code/>; Upendra Baxi, "Securing the Code | *The Indian Express*," accessed July 20, 2016, <http://indianexpress.com/article/opinion/columns/uniform-civil-code-article-44-2924463/>; Venkaiah M. Naidu, "Why Not a Common Civil Code for All?," *The Hindu*, July 16, 2016, <http://www.thehindu.com/opinion/lead/union-minister-venkaiah-naidu-on-uniform-civil-code-why-not-a-common-civil-code-for-all/article8855995.ece>.

¹⁰ For an interesting take on Uniform Civil Code (UCC) debate in India see Tanja Herklotz, "Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court," *VRÜ Verfassung Und Recht in Übersee* 49, no. 2 (2016): 148–74. Herklotz argues that while uniform civil code remains a political demand in India, women's movement, even the judiciary (especially Supreme Court of India), have given up the demand of Uniform Civil Code. Herklotz argues convincingly that judiciary in India, continues to protect rights of women without pursuing demand for UCC. According to Herklotz UCC is now merely a rhetorical demand. Herklotz is right to the extent that judiciary in India has undoubtedly played an important role in harmonization of family laws of different religions and communities by protecting rights of women. However, it is also true that time and again it is the Apex Court which has brought attention towards necessity of promulgating Uniform Civil Code in India. Latest example of the Apex Court igniting the controversy of Uniform Civil Code has been *Prakash v Phulwati*, 2 Supreme Court Cases 36 (Supreme Court 2016).

¹¹ Some prominent feminist legal scholars who no longer support the idea of Uniform Civil Code are: Agnes, *Law and Gender Inequality*; Ratna Kapur, "The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion," *Theoretical Inquiries in Law* 8, no. 2 (2007): 537–70. Also see Nivedita Menon, "Uniform Civil Code – the Women's Movement Perspective," *Kafila* (blog), October 1, 2014, <https://kafila.org/2014/10/01/uniform-civil-code-state-of-the-debate-in-2014/>; John H. Mansfield, "The Personal Laws or a Uniform Civil Code," in *Religion and Law in Independent India*, ed. Robert D. Baird (New Delhi:

The last few decades have witnessed a sea-change in feminist scholars' understanding of progressiveness. Progressiveness is no longer equated with uniformity in personal laws to govern family matters.¹² According to contemporary scholars, progressiveness in matters relating to marriage and intimate relationships does not lie in making people follow one singular form of organizing personal relationships or in imposing monogamy through instruments of law or criminal sanctions.¹³ Progressiveness with regards to personal relationships now lies in: (i) allowing every individual, especially women, the freedom to choose or devise different ways of organizing personal relationships, different from the ones prescribed or sanctioned by their respective personal family laws; (ii) imparting legal validity to these different ways chosen by people; and (iii) having a rights

Manohar Publications, 1993), 139–77. Taking cognizance of diversity in India Mansfield suggested,

With the benefit of intervening experience of a complex and ever-changing Indian society, an open-minded approach seems called for, one unconstrained either by the hesitancy of a foreign ruler to interfere in the laws and customs of subject peoples, or by a purely theoretical notion that a nation-state cannot exist without a uniform substantive law on all subjects. The nation-state that India needs is one that is adapted to its special circumstances. (At p. 176-177)

For a similar view also see Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context," in *Religion and Personal Law in Secular India: Call for Judgement*, ed. Gerald James Larson (Bloomington and Indiana Pollis: Indiana University Press, 2001), 36–65;

For some recent examples of scholarship which does not see Uniform Civil Code as essential for women's empowerment see "In the Name of Women," *Economic and Political Weekly* 51, no. 43 (2016): 7. Shehnaaz Sheikh, "Why I Took on Triple Talaq," *Indian Express*, November 16, 2016, <http://indianexpress.com/article/opinion/columns/triple-talaq-uniform-civil-code-indian-constitution-4377532/>.

¹² Nivedita Menon, "Women and Citizenship," in *Wages of Freedom*, ed. Partha Chatterjee (New Delhi: Oxford University Press, 1998); Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Orient Blackswan, 2004).

Also see Menon, "Uniform Civil Code – the Women's Movement Perspective," October 1, 2014. Adopting a new understanding of progressiveness Menon writes,

The following of heterogeneous practices need not be inherently inegalitarian, nor the imposition of a uniform law necessarily the opposite.

¹³ Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press, 2011) (At p. x);

Also see Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*; also Nivedita Menon, "Uniform Civil Code – the Women's Movement Perspective," *Kafila* (blog), October 1, 2014, <https://kafila.org/2014/10/01/uniform-civil-code-state-of-the-debate-in-2014/>. Vasudha Dhagamwar, "Panch Parmeshwar," *Economic and Political Weekly* 44, no. 31 (2009): 13–16. For a detailed discussion on issues relating to criminalization of polygamy see Cyra Akila Choudhury, "Between Tradition and Progress: A Comparative Perspective on Polygamy in United States and India," *University of Colorado Law Review* 83 (2012): 963–1027.

framework to protect rights of women who choose to be a party to different formal and informal ways of organizing adult intimacy.¹⁴

Scholars in India are accepting, albeit reluctantly, that relationships between individuals, especially intimate sexual relations can never be regulated completely by the law made by the State.¹⁵ It is also being accepted that the limits of the State and the Law in regulating lives of people is an issue not only for India, but also in Western jurisdictions, where the massive unmarried cohabitation – and now the increasingly prominent position of same-sex unions – have raised the agenda of the desirability and feasibility of state control of interpersonal relations afresh.¹⁶

Keeping pace with the international developments,¹⁷ contemporary scholarship on rights of women in India is gradually acknowledging that promulgation of uniform,

¹⁴ The works which emphatically put forward this demand are: Flavia Agnes, *Family Law II: Marriage, Divorce and Matrimonial Litigation*, vol. II (New Delhi: OUP India, 2011); Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

¹⁵ Agnes, *Family Law Volume I*; Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

¹⁶ For a general discussion on the role of the State in regulating family matters see Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96, no. 7 (1983): 1497–1578. John Eekelaar, "Family Law and Social Control," in *Oxford Essays in Jurisprudence*, Third Series (Oxford, New York: Oxford University Press, 1987), 267; Nadine Taub and Elizabeth M. Schneider, "Women's Subordination and the Role of Law," in *The Politics of Law: A Progressive Critique*, ed. David Kairys, third edition (New York: Basic Books, 1998). For a proposal for legal recognition of 'common law marriage doctrine' in the United States see Cynthia Grant Bowman, "A Feminist Proposal to Bring Back Common Law Marriage," *Oregon Law Review* 75, no. 3 (1996): 709; "Marriage as Contract and Marriage as Partnership: The Future of an Antenuptial Agreement," *Harvard Law Review*, Developments in the Law- The Law of Marriage and Family, 116, no. 7 (2003): 2075–98.; Ariela R. Dubler, "Wifely Behaviour: A Legal History of Acting Married," *Columbia Law Review* 100, no. 4 (2000): 957–1021. For detailed discussion on dilemmas relating to role of the state in interpersonal relationships see Tracy E. Higgins, "Book Review: Are Women Human? And Other International Dialogues by Catharine A. MacKinnon," *Yale Journal of Law & Feminism* 18, no. 2 (2006): 523.

¹⁷ For different feminist approaches towards role of law and rights discourses in women's empowerment see Karen Engle, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female," *New England Law Review* 26 (1992): 1509–26. Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay," *The Yale Law Journal* 95, no. 7 (1986): 1373–1403; Martha Minow, "Justice Engendered: Foreword," *Harvard Law Review* 101, no. 1 (1987): 10–90.; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (USA: Harvard University Press, 1987). Emphasising the idea of law as gendered, Smart states,

There are three phases we can identify in the development of the idea that law is gendered.The first stage is epitomized by the phrase 'law is sexist', the second by the phrase 'law is male' and finally we reach the point of arguing that 'law is gendered'. (At p. 30)

gender-neutral laws and imposition of a singular form of family can neither eradicate the influence of religion or traditions from people's lives nor does it necessarily result in empowerment of women, or make them 'independent and autonomous beings'.¹⁸ With respect to the polygamous or bigamous relationships, it has gradually become clear that legal and/or criminal sanctions neither deter men from engaging in such relationships nor empower women with equality.¹⁹ There is also an increasing yet reluctant realisation that total state control, for example in the form of compulsory registration of marriages, is neither going to work effectively nor is it going to be favourable for women.²⁰ A growing number of scholars now argue that having laws to impose uniform, standard patterns of organising personal relationships may have dangerous consequences for women.²¹ Legal scholars in India also are now willing to endorse the fact that modern State and uniform laws, far from promoting and protecting autonomy and agency of individuals, become means for using the might of the State and the law to impose a particular ideology or

Also see Mary Joe Frug, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)," *Harvard Law Review* 105, no. 5 (1992): 1045–75.; Kevat Nousiainen et al., eds., *Responsible Selves: Women in the Nordic Legal Culture*, First Edition (Aldershot, Hants, England; Burlington, VT: Ashgate Pub Ltd, 2001).

For challenges to the concepts of 'nation' and state see Crawford Young, ed., *The Rising Tide of Cultural Pluralism: The Nation-State at Bay?* (Wisconsin: Univ of Wisconsin Press, 1993).

¹⁸ Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press, 2003), Nivedita Menon, "It Isn't about Women," *The Hindu*, July 15, 2016, <http://www.thehindu.com/opinion/lead/nivedita-memon-on-uniform-civil-code-it-isnt-about-women/article>; Cyra Akila Choudhury, "(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India," *Columbia Journal of Gender and Law* 17, no. 1 (2008): 45.

¹⁹ Many recent feminist works highlight disadvantages faced by women in India as a result of imposition of monogamy, for example see, Flavia Agnes, *Family Law II: Marriage, Divorce and Matrimonial Litigation*, vol. II (New Delhi: OUP India, 2011). This realization among scholars, on the one hand, is result of increasing number of cases of injustice against women due to insistence on formalities by the state and the judiciary for considering a relationship as a valid marriage. On the other hand it is result of increasing influence of literature from western countries which show how formal equality or state control of personal relationships turned out to be disadvantageous to women. For changing perceptions against transferring complete control of formation and dissolution of marriage relationships to State also see, Flavia Agnes, "Conjugality, Property, Morality and Maintenance," *Economic and Political Weekly* 44, no. 44 (2009): 58–64.; Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

²⁰ Strong proponents as stated before too are: Agnes, *Family Law Volume I*. Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

²¹ Menon, "Uniform Civil Code – the Women's Movement Perspective," October 1, 2014.

moral standards on individuals and groups of individuals.²² Scholars are now willing to recognize that efforts for uniformisation of family laws in the colonial era have been responsible for curtailing diversity in family laws.²³ It is also being recognized that non-recognition of customary practices has been a cause of denial of rights of women.²⁴ Recent streams of women's rights scholars, therefore, now expect law to be sensitive to those individuals, particularly women, who did not or could not find it possible to submit to the conditions prescribed by law for establishing intimate relationships. In other words, the legal system in India, is now expected to take steps to protect rights of individuals, particularly of women, while reducing its control over intimate relationships and allowing individuals freedom to engage in personal/intimate relationships governed by their choice, customs, traditions or religion-based laws. The legal system in India is expected to protect rights of its own victims- the victims of those legislations which were once considered beneficial for women.²⁵ Women's rights scholarship expects law to be sensitive to differences between women based on religion, caste, ethnicity, and sexual orientation.²⁶

All the above changes- scholars' demand for more individual freedom to choose ways of organizing adult intimacy, new understandings about nature of law and

²² Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*; Agnes, *Law and Gender Inequality*; Agnes, *Family Law Volume I*.

²³ Agnes, *Law and Gender Inequality*; Agnes, *Family Law Volume I*; Menon, *Recovering Subversion*; Menon, "Uniform Civil Code – the Women's Movement Perspective," October 1, 2014.

²⁴ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Scholars like Mehra have lately taken note of the fact rather explicitly that pre-colonial India recognized various ways and forms of adult intimacy and that these ways and forms came to demonized and criminalized with advent of colonial rule, in the process of introducing reforms in the family laws. For a detailed discussion on this issue also see Agnes, *Family Law Volume I*; Agnes, *Family Law II*, 2011.

²⁵ Menon, "It Isn't about Women."

²⁶ Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics," *Harvard Human Rights Journal* 15, no. 1 (2002): 1–38. Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (London; Portland, Or.: Routledge-Cavendish, 2005). Choudhury, "(Mis)Appropriated Liberty." For necessity of taking account of differences between women see Scales, "The Emergence of Feminist Jurisprudence." Scales states, "we must seek a legal system that works and, at the same time, makes differences a cause of celebration, not classification." (At p. 1376); Siobhan Mullally, "Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case," *Oxford Journal of Legal Studies* 24, no. 4 (2004): 671–92.; Catharine A. MacKinnon, "Sex Equality under the Constitution of India: Problems, Prospects, and 'Personal Laws,'" *International Journal of Constitutional Law* 4, no. 2 (2006).

changed expectations from the State and its legal system, skepticism towards Uniform Civil Code as the means of women's empowerment, increasing concern for differences among women- appear to be very important. Consequently, current streams of scholarship undoubtedly looks very different from the discourses in the pre-1990s phase wherein scholars perceived promulgation of a Uniform Civil Code or substituting religion based laws with set of secular laws as a rather 'magic wand' to neutralize influence of religion or traditions from women's lives, and thereby to resolve all issues relating to denial of rights to women. With all the above changes socio-legal discourses in India have also been able to keep pace with culture and rights scholarship in international arena.²⁷

While above described changes in socio-legal discourses is an important development, some important questions that need consideration are: what is the significance of these changes for the cause of women's rights, and also for an old, but highly contentious issue of relationship between traditions and rights of women? Does above-described shift in stance of scholars and activists actually imply challenging colonial era presumptions which were responsible for privileging modern law and state as means for protecting rights of women? Do these changes signify increasing sensitivity towards non-western traditions and ancient phenomenon of cultural and legal pluralism,²⁸ which continues to be a contemporary reality in India despite having suffered distortions during colonial era? Does recent scholarship actually offer tools for Indian legal system to protect rights of women while being sensitive to the differences between women?

²⁷ *Infra* section 1.2

²⁸ For a comprehensive discussion on the concept of legal pluralism see Werner Menski, *Comparative Law in a Global Context*, 2nd ed. (Cambridge: Cambridge University Press, 2006). (Especially chapter 2, At pp. 82-112). Legal pluralism is a concept which has been approached in many different ways by scholars, and there does not exist a universally accepted definition of this term. Legal Pluralism has also been famously divided into the categories of 'weak' and 'strong' legal pluralism. See John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 18, no. 24 (1986): 1-55. (At p. 5). Drawing on the Griffiths' strong legal pluralism, this study invokes the term legal pluralism in a broad way, predominantly to challenge the idea of law as a unified, secular entity arising only from the power of the state and administered by a single set of state institutions. It aims to use the term to emphasise the idea of law as an entity which exists in close connection with values, ideology, religion or culture.

This study aims to address the above questions. It undertakes a close analysis of the recent changes in socio-legal scholarship concerned with rights of women in India to understand the significance of these changes for the cause of women's rights in India. It aims to explore whether the recent shift in scholarship is about offering better tools for the Indian legal system to find a balance between cultural and legal diversity and rights of women in India particularly in the domain of family.

1.2 Emerging concern to Rethink the Relationship between Gender Justice and Traditions: An International Phenomenon

The relationship between law and cultural diversity has been one of the most contentious issues for anthropologists, human rights scholars and for anybody concerned with social change, particularly in non-western countries since the advent of colonial era.²⁹ Despite more than a century long deliberations this issue continues to pose tremendous challenges for almost all the modern nation states and their legal systems even today. The core issue which has generated heavy disagreement amongst scholars has been: whether the instruments of the State and its legal system should be used to deal with apparently objectionable culture or religion based practices prevalent in non-western societies to aid the process of progress and social change.³⁰ A point of disagreement, in other words, was whether the instruments of the State and Law should be used to introduce western values of 'individualism' and 'human rights' in non-western cultures. Inability to reach an agreement kept the scholars and activists divided for many decades into various mutually opposing camps such as universalists and cultural relativists; traditionalists and modernists; conservatives and progressives; communitarians v individualists.³¹

²⁹ Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge; New York: Cambridge University Press, 2001); Anthony O'Hear, "Culture," *Routledge Encyclopaedia of Philosophy* (Taylor and Francis, 1998).

³⁰ In Indian context some of such objectionable practices can be listed as: dowry, bride price, child marriages, prohibition on marriage of widows, sati, bigamy or polygamy, unilateral divorces etc. Some other practices from other cultures are: female genital mutilation,

³¹ For a comprehensive summary of rich literature addressing the issue relationship between culture and rights see Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2 edition (Oxford; New York: Oxford University Press, USA, 2000). Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, "Introduction," in *Culture and Rights: Anthropological Perspectives*, ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 1–25.; Tracy Higgins, "Anti-Essentialism, Relativism, and Human Rights," *Harvard Women's Law Journal* 19 (1996):

At the time of promulgation of the Universal Declaration of Human Rights in 1948 and also for a few decades after, the anthropologists who favoured protection of cultural diversity argued that the human rights discourse with its tenets of 'legalism', 'rights' and 'individualism'³² was of western origin.³³ These scholars objected to reorganisation of non-western societies around the above three tenets and criticised rights scholars for being ethnocentric.³⁴ On the other hand, the rights scholars, who perceived oppression of individuals, particularly of women inherent in societies which were not organised around the above three tenets alleged anthropologists of being insensitive towards oppression and poor human conditions. They advocated fundamental re-organisation of the non-western societies through the instrument of law even at the cost of erosion of cultural diversity. Legal anthropologists, who highlighted non-universality of the concept of 'law', pointed it out to the development theorists and the rights scholars that introduction of a rule of law discourse in Asian and African societies amounted to imposition of a Eurocentric viewpoint on the rest of the world and that it would result into eradication of indigenous values and indigenous understanding of law. Political theorists who

89–126.; Young, *The Rising Tide of Cultural Pluralism*.; Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6, no. 4 (1984): 400–419.

³² For identification of 'rights', 'individualism', and 'legalism' as three tenets of the concept of Human Rights see S. Prakash Sinha, "Human Rights: A Non-Western Viewpoint," *ARSP: Archives for Philosophy of Law and Social Philosophy* 67, no. 1 (1981): 76–91. Raimon Pannikar, "Is the Notion of Human Rights a Western Concept?," *Interculture* XVII, no. 1 (1984): 28–47. (At pp. 44–47)

It is believed that societies not organized the tenets of rights, individualism and legalism are the ones which given preference to duties over rights; which gave central importance to institutions of marriage and family instead of individual or which were governed by religion based or customary laws instead of being governed by laws promulgated by a secular, modern state. See Pannikar., also Sinha, "Human Rights." Highlighting western nature of the concept of rights Sinha states

There are three basic tenets that are inherent in the present formulation of human rights. One, the fundamental unit of society is the individual, not the family. Two, the primary basis for securing human existence in society is through rights, not duties. Three, the primary method of securing these rights is through legalism where under rights are claimed and adjudicated upon, not reconciliation, repentance, or education. (At p. 77)

For discussion on western nature of the concept of human rights also see Nidhi Gupta, "Women's Human Rights and Practice of Dowry in India: Adapting a Global Discourse to Local Demands," *Journal of Legal Pluralism* 48 (2003): 85–123.

³³ American Anthropological Association The Executive Board, "Statement on Human Rights," *American Anthropologist* 49, no. 4 (1947): 539–43. (At p.539)

³⁴ *ibid.*

underscored the importance of community/culture for individuals and propagated virtues of multiculturalism disagreed with those who insisted on effecting fundamental transformation in non-western communities through law in order to introduce the value of 'individualism' and secure protection of rights for every individual.³⁵

While inconclusive debates about relationship between the east and the west, tradition and modernity and about role of law in dealing with cultural diversity continue to consume much scholarly energy even today,³⁶ the last few decades have led to some significant changes across all branches of social science scholarship.³⁷ An important change is scholars' readiness to draw upon the rich domain of critical theory and the diverse but interrelated fields of post-modernism, post-structuralism, and post-colonialism which have offered rich insights to challenge the binary oppositions of culture and rights; east and west; tradition and modernity.³⁸ Whether it be anthropologists³⁹ or the rights scholars, legal scholars, sociologists or political

³⁵ Michael J. Sandel, *Liberalism and the Limits of Justice*, 2 edition (Cambridge, UK; New York: Cambridge University Press, 1998).

³⁶ Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics* 108, no. 4 (1998): 661–84, <https://doi.org/10.1086/233846>.

³⁷ For dilemmas faced by rights scholars with increasing concern for cultural differences see Tracy E. Higgins, "Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights," *Columbia Human Rights Law Review* 30 (1999): 225–47.

³⁸ Ann-Belinda S. Preis, "Human Rights as Cultural Practice: An Anthropological Critique," *Human Rights Quarterly* 18, no. 2 (1996): 286–315. Preis states

In order to avoid that new debates in human rights resemble old anthropology in its "complicity with imperialism, a commitment to objectivism, and a belief in monumentalism, a paradigmatic shift is therefore needed: the critical 1980s poststructuralist and postmodernist work in sociology and anthropology must now begin to make substantial inroads into the analysis of human rights. (At p. 310)

For comprehensive and insightful description of change or of the degree of 'paradigmatic transition' in social science scholarship see Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995). (especially chapter 1)

³⁹ In the field of anthropology scholars talk of paradigmatic shift as there is a challenge to construction of cultures on the basis of objective neutral description. For example see Ann-Belinda S. Preis, "Human Rights as Cultural Practice: An Anthropological Critique," *Human Rights Quarterly* 18, no. 2 (1996): 286–315. Talking of introduction of post-modernist concepts like 'deconstruction', 'reflexivity', 'experimentalism' in anthropology Preis points out,

During the past ten years or so, volumes carrying titles like "Interpretive Social Science," "The Invention of Culture," "Writing Culture," "Creating Culture," and "The Predicament of Culture," have signalled a repositioning of anthropology with regard to its object of study. In the process, anthropology's conventional use of analytical concepts and theoretical tools has been critically

scientists, experts across domains in last few decades have come to accept the views that ‘modernity’, ‘rule of law’, ‘rights’ are concepts that have been deployed since the colonial era to perpetuate imperialism, to suppress cultural differences and to impose white, male, western ideology on the rest of the world.⁴⁰ One of the major concerns of scholars across all the branches of social sciences is to make efforts to undo the ideological heritage of colonialism both in colonised and colonising countries. Almost every branch involves attempts, whether explicit or implicit, to decentre what has come to be addressed as the intellectual sovereignty and dominance of Europe. There have been efforts from diverse fields which seek to extricate non-western cultures from the history of colonialism, and to strengthen and develop the resources of their histories and political and intellectual traditions.⁴¹

The increasing influence of critical scholarship has made support to non-western cultures possible with challenges to some of the fundamental premises which formed the basis for superiority claims of the colonial rule and which were responsible for coming into existence various aforementioned binary oppositions.⁴² For example, post-modernism makes challenge to the above dichotomies possible as it deconstructs one of important premises of western superiority- the modernist enlightenment ideal of universal true knowledge which could be achieved through

reviewed under exotic banners like "de-construction," "reflexivity," and "experimentalism," most of which tend to converge in the broader matrix of "post-modernism." This has involved a rather self-conscious re-examination of the anthropological enterprise, from the participant-observation ideal to the natural, even "style" of (writing) the anthropological account. Many underlying assumptions, primarily the homogeneity, holism, and integrity evident in classical anthropological analysis, have been scrutinized on the basis of the recognition of an overall crisis-the erosion of classical norms-in the social sciences. As the above titles indicate, anthropologists have been forced to reevaluate such central analytical concepts in anthropology as that of culture, and by extension, the idea of "cultural difference." (At p. 297)

⁴⁰ Karen Engle, "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999," *Human Rights Quarterly* 23, no. 3 (2001): 536–59.; Higgins, "Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights."

⁴¹ John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword," *Law & Social Inquiry* 26, no. 2 (April 1, 2001): 305–14; Uday Chandra, "Liberalism and Its Other: The Politics of Primitivism in Colonial and PostColonial Indian Law," *Law & Society Review* 47, no. 1 (2013): 135–68.

⁴² Zygmunt Bauman, *Legislators and Interpreters: On Modernity, Post-Modernity and Intellectuals* (Cambridge: Polity Press, 1987).

exercise of reason by a rational human being.⁴³ It was a colonial claim that European society was more civilised because human reason and rationality were inherent to European worldview and as a result Europeans, as least some elites within Europeans, had access to Universal Truth- to the true knowledge. The colonial perception was that reason and human rationality were not given any importance in Asian and African cultures, which had kept, as it was believed, these cultures deprived of true knowledge.⁴⁴ It was these claims which had discredited the ideological structures of Asian and African societies making them appear as mere myth or superstitions. Post-modernism initiated a shift in rights and culture scholarship as it opened the possibilities to extricate conceptual structures prevalent in other parts of the world and challenged the idea of universal true knowledge.⁴⁵ It

⁴³ Elizabeth Deeds Ermarth, "Posmodernism," *Routledge Encyclopaedia of Philosophy* (Routledge, 1998). Also Costas Douzinas, *The End of Human Rights* (Oxford; Portland, Or: Hart Publishing, 2000). Talking about postmodernity Douzinas note,

In postmodernity, the idea of history as a single unified process which moves towards the aim of human liberation is no longer credible, and the discourse of rights has lost its earlier coherence and universalism. (At p. 6)

Also see Bauman, *Legislators and Interpreters*. Describing nature of post-modernist discourse Bauman states,

The post-modernist discourse, on the other hand, is about the credibility of 'modernity' itself as a self-designation of Western civilization, whether industrial or post-industrial, capitalist or post-capitalist. It implies that the self-ascribed attributes contained in the idea of modernity do not hold today, perhaps did not hold yesterday either. The post-modernist debate is about self-consciousness of Western society, and the grounds (or the absence of grounds) for such consciousness. (At p. 118)

Maxine Eichner, "On Postmodernist Feminist Legal Theory" 36, no. 1 (2001): 1-77.

⁴⁴ For a discussion on this point see: Chandra, "Liberalism and Its Other: The Politics of Primitivism in Colonial and Post-Colonial Indian Law"; Sally Engle Merry, "Law and Colonialism," *Law & Society Review* 25, no. 1 (1991): 889-922.

⁴⁵ Santos, *Toward a New Common Sense*. Highlighting exclusion of other forms of knowledge as a dominant phenomenon from sixteenth to early twentieth century in natural sciences and also in social sciences Santos states,

The prevailing model of rationality of modern science came out of the scientific revolution of the sixteenth century, and was developed primarily in the domain of the natural sciences during the following centuries. Although in the eighteenth century there were already some signs in that direction, the model would be adopted by the emerging social sciences only in the nineteenth century. From then on, it is appropriate to speak of a global (that is, Western) model of scientific rationality, with some internal variation, to be sure, but one which ostensibly discriminates against two nonscientific (hence, potentially disturbing) forms of knowledge: common sense, and the so-called humanities (the latter including, among others, history, philology, legal doctrine, literary studies, philosophy and theology).

The new scientific rationality, being a global model, is also a totalitarian model, in as much as it denies rationality to all forms of knowledge that do not abide by its own epistemological principles and its own methodological rules. (At p. 11-12)

brought home the point that truth, knowledge and reality are all culturally relative and that human subjectivity and human rationality are heterogenous and diverse, i.e. not universal.⁴⁶ Postmodernism helped to establish that not only is there a plurality of perspectives there is also no way that one perspective can claim superiority over the other.⁴⁷

The insights from critical theory also offered necessary tools in favour of non-western cultures as they drew attention towards the imperialistic, hegemonic tendencies in the colonial imagery of non-western cultures. Colonial imagery of these cultures rested on the modernist presumptions that true knowledge corresponds to how the world actually is and that exercise of reason made it possible to gain this true knowledge. It was based on the presumptions about possibility of objectivity and neutrality in description of truth, and in representation of knowledge. Post-structuralism, highlighting relationship between power and knowledge, between power and truth, deconstructed the claims that colonial descriptions of non-western societies are the true and accurate description.⁴⁸ Poststructuralism made it possible to raise doubts on the colonial description of non-western cultures and to contend that colonial rulers constructed these cultures in negation as a means to perpetuate European domination.

Poststructuralist thinkers like Michael Foucault argued that truth is whatever we agree to call and construct it as such; there is no Archimedean point from which to observe the world independently of knowledge and power relations.⁴⁹ Post-structuralist scholars like Jacques Derrida have suggested that scholars should construct the underlying meanings that were suppressed in formation of texts that seek to

⁴⁶ Zygmunt Bauman, *Intimations of Postmodernity* (London; New York: Routledge, 1991).

⁴⁷ For feminist perspectives on the idea of universal Truth and knowledge see Margaret Jane Radin, "Pragmatist and the Feminist," *Southern California Law Review* 63 (1990 1989): 1699–1726. Emily Jackson, "Contradictions and Coherence in Feminist Responses to Law," *Journal of Law and Society* 20, no. 4 (1993): 398–411. Minow, "Justice Engendered." Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103 (1989): 829–88.

⁴⁸ Gary Gutting, "Post-Structuralism," *Routledge Encyclopaedia of Philosophy* (Rochester, NY: Routledge, 1998). Also see Gary Gutting, "Post-Structuralism in Social Sciences," *Routledge Encyclopaedia of Philosophy* (Rochester, NY: Routledge, 1998).

⁴⁹ Gutting, "Post-Structuralism."

represent reality, and thereby challenge their meta-narratives and claims to foundational, universal truth and knowledge.⁵⁰

With its deconstructivist claims of universal truth and knowledge, critical scholarship makes it possible to challenge another basic premise which formed the basis for western superiority- the possibility of fundamental reorganisation of society through 'rule of law', a concept which was presumed to embody universal truth and which had rational human subject as foundation of knowledge. It was part of the colonial narrative that progress required presence of law as a unitary phenomena, as something objective and neutral, something which is autonomous from the society and which is capable of 'constructing' the society consisting of rational, reasonable and free beings. Postmodernist/poststructuralist thought carries relevance for non-western cultures as it refutes the claims of objectivity and neutrality in law,⁵¹ as it shows that law is integrally related to society and is just one discourse amongst many other discourses.

Critical scholarship has proved to be particularly significant for the cause of non-western cultures as it resulted in emergence of a branch referred as post-colonialism. This stream of thought which draws upon post-modernism/post-structuralism discusses cultural and political ramifications of colonialism in both colonized and colonising societies. Relevance of post-colonial thought for Asian and African cultures lie in the way it challenges our knowledge of Asian and African civilisations, their histories, and their political, economic, and socio-cultural system

⁵⁰ Ermarth, "Posmodernism"; Gutting, "Post-Structuralism."

⁵¹ One of the pioneers of challenge to modern law from feminist perspectives has been Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (1983): 635–58. For further discussions see Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103 (1989): 829–88; Catharine A. MacKinnon, "Reflections on Sex Equality under Law," *The Yale Law Journal* 100, no. 5 (1991): 1281–1328; Frances E. Olsen, "The Myth of State Intervention in the Family," *University of Michigan Journal of Law Reform* 18, no. 4 (1985): 835–64. For critique of elements like 'objectivity', 'neutrality', 'autonomy' as essentially 'male values' see Robin L. West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," *Wisconsin Women's Law Journal* 3 (1987): 81–145; Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process," *Berkeley Women's Law Journal* 39 (1985): 39–63; Joan C. Williams, "Deconstructing Gender," *Michigan Law Review* 87 (1989): 531–58; Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," *Yale Law Journal* 100 (1991): 1731. For changing perceptions of legal scholars in general towards modern law and modern state see Alan Norrie, "Critical Legal Studies," *Routledge Encyclopedia of Philosophy* (UK: Routledge, n.d.).

have been constructed during the colonial period and also in post-colonial periods.⁵² It aims to show that dominant, supposedly universal epistemological models, theories and concepts that have been used in analysing and explaining Asian and African societies are specific to European societies, and that they are Eurocentric, and are thus biased and inappropriate tools of analysis.

Post-colonial theory seeks to reveal the inherent falsities and contradictions of ‘civilising mission’ of European colonialism, and its continuing presence in academia and cultures all over the world. It problematises the binaries of ‘modernity’ and ‘tradition’, concepts that were constructed and interwoven into civilisational meta-narratives of colonialism.⁵³

It is perhaps influence of critical theory that culture or tradition, after being denigrated for a long time, is now a key factor of analysis for socio-legal scholarship. An increasing number of works cutting across different disciplines have emerged which perceive diversity as a richness to be celebrated rather than being a problem to be solved.⁵⁴ As Kuper rightly points out, “everyone is into culture now. For anthropologists, culture was once a term of art. Now the natives talk culture back at them.”⁵⁵ He further mentions, “the cultural self-consciousness developing among imperialism’s erstwhile victims is one of the more remarkable phenomena of world history in the later twentieth century.”⁵⁶ Contrary to earlier perceptions where cultures were once considered as an epitome of backwardness in most western democracies, the understanding now is that ‘minority cultures empower the weak:

⁵² James Thuo Gathii, “Imperialism, Colonialism and International Law,” *Buffalo Law Review* 54, no. 4 (2007): 1013–66.

⁵³ Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (New Jersey: Princeton University Press, 1996). Also see Nicholas B. Dirks, “Foreword,” in *Colonialism and Its Forms of Knowledge: The British in India*, by Bernard S. Cohn (New Jersey: Princeton University Press, 1996), ix–xvii. Describing law as site of colonial power Dirks states,

One of the sites of colonial power that seemed simultaneously most benign and most susceptible to indigenous influences- namely law- in fact became responsible for institutionalizing peculiarly British notions about how to regulate a colonial society made up of “others” rather than settlers, leaving extremely problematic legacies for contemporary Indian societies. (At p. x)

⁵⁴ For a strong support to this view see Menachem Mautner, “Three Approaches to Law and Culture,” *Cornell Law Review* 96, no. 4 (June 11, 2011): 839-868.

⁵⁵ Adam Kuper, *Culture: The Anthropologists’ Account* (Harvard University Press, 1999).

⁵⁶ *ibid.*

they are authentic; they speak to real people; they sustain variety and choice; they feed dissent'.⁵⁷ A major concern for scholars in the West in last few decades has been to find means to protect minority groups (both indigenous and immigrant) from state oppression in what is alleged to be a culture of majoritarianism.⁵⁸ There are voices to save non-western cultures from what are now perceived as the ill-conceived dichotomies of tradition versus modernity or culture versus rights.⁵⁹

Having become key factor for socio-legal analysis, culture has finally found a place in the feminist analysis as well. Scholars and activists concerned about women's rights in different parts of the world have come to explicitly support the trend of increasing sensitivity towards tradition.⁶⁰ This trend has been particularly dominant in the western democracies which are continually facing the challenge of multiculturalism.⁶¹ Here, some of the feminist authors have come to rally behind the

⁵⁷ *ibid.* At p. 4

⁵⁸ Nathan Glazer, "Individual Rights against Group Rights," in *Human Rights*, ed. Eugene Kamenka and Alice Erh-Soon Tay (London: Edward Arnold, 1978), 87–103.; Homi K. Bhabha, *The Location of Culture* (London; New York: Routledge, 1994).

⁵⁹ Leti Volpp, "Talking Culture: Gender, Race, Nation, and the Politics of Multiculturalism," *Columbia Law Review* 96 (1996): 1573–1617. Addressing the issue of opposition between culture and rights Volpp stated,

We need to abandon the ethnocentric notion of the inferiority of certain cultures, and to understand that all communities are characterized both by patriarchal formations as well as by resistance to those formations. We also must acknowledge that posing multiculturalism as antithetical to feminism is a false opposition and one that is predicated on racism. Further, refusing an explicit consideration of "race" or "culture" within our legal system will not result in "colorblind" and "cultureblind" meritocratic justice, but in a replication of dominant patterns of dispersal of power. These are premises that need to be understood if we want to move forward in scholarship examining the relationship of culture and the law. (At p. 1617)

Crawford Young, "The Dialectics of Cultural Pluralism: Concept and Reality," in *The Rising Tide of Cultural Pluralism: The Nation-State at Bay?* (Wisconsin: Univ of Wisconsin Press, 1993), 3–35. Drawing attention towards changing nature of socio-legal discourses Young states, "A transforming relationship between cultural pluralism and the nation-state is a central drama of our times." (At p. 4)

Also see Leti Volpp, "Feminism versus Multiculturalism," *Columbia Law Review*, January 1, 2001, 1181-1218.

⁶⁰ Douzinas, *The End of Human Rights*. Expressing concern for pluralism Douzinas ask Can there be ethics that respects the pluralism of values and communities? Can we discover in history a non-absolute conception of good, that could be used as a quasi-transcendent principle of critique? (At p. 13)

⁶¹ Jeff A. Redding, "Institutional vs. Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems," *Journal of Islamic State Practices in International Law* 6 (2010): 1–25.; Dominic McGoldrick, "Multiculturalism and Its Discontents," *Human Rights Law Review*

voices which underscore the inadequacy of a traditional liberal conception of rights and concede to the demands of group rights for protection of different communities or cultures.⁶² In this new trend feminist discourses challenge the perceptions wherein claims for protection of culture or demands for sensitivity towards religion were seen to prohibit the pursuit of universal individual rights, or claiming protection of culture implied accepting oppression or subordination of individual to the arbitrary, irrational and superstitious demands of traditions or communities.⁶³ Focusing specifically on the requirements of minority groups in western democracies, scholars advocate the right to religious freedom with the contention that ‘religious traditions have also been powerful sources of protection for human rights, of commitment to justice, and of energy for social change’.⁶⁴ In this new wave, scholars seek means to

5, no. 1 (2005): 27–56.; Ayelet Shachar, “Two Critiques of Multiculturalism,” *Cardozo Law Review* 23, no. 1 (2001): 253–97.

⁶² Jeff Spinner Halev, “Feminism, Multiculturalism, Oppression, and the State,” *Ethics* 112, no. 1 (2001): 84–113. Spinner- Halev points out,

The justice of ensuring individual rights and equality for all must be balanced against the injustice of a state imposing reform upon the group it oppresses. (At p. 85).

Also see Jeff Spinner-Halev, “Liberalism and Religion: Against Congruence,” *Theoretical Inquiries in Law* 9, no. 2 (2008): 553–572.

⁶³ Susan Williams, “Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption,” *Indiana Journal of Global Legal Studies* 18, no. 1 (2011). Also see Catherine Powell, “Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America,” *Hastings Law Journal*, Georgetown Law Faculty Publications and Other Works, 57 (2005): 331–83. Martha Nussbaum, “In Defense of Cultural Values,” *Idaho Law Review* 36 (2000): 379–448.

⁶⁴ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2001). Emphasising on the ‘intrinsic value of religious capabilities’ Nussbaum writes,

To be able to search for an understanding of the ultimate meaning of life in one’s own way is among the most important aspects of a life that is truly human. One of the ways in which this has most frequently been done historically is through religious belief and practice; to burden these practices is thus to inhibit many people’s search for the ultimate good. Religion has also been intimately and fruitfully bound up with other human capabilities, such as the capabilities of artistic, ethical, and intellectual expression. It has been a central focus of the moral education of the young, both in the family and in the community. Finally, it has typically been a central vehicle of cultural continuity, hence an invaluable support for other forms of human affiliations and interaction. To strike at religion is thus to risk eviscerating people’s moral, cultural, and artistic, as well as spiritual, lives. (At p. 179–180)

Also see Cheryl B. Preston, *Women in Traditional Religions: Refusing To Let Patriarchy (Or Feminism) Separate Us From The Source Of Our Liberation*, 22 Miss. C. L. Rev. 185 (2003); Ayelet Shachar, “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law,” *Theoretical Inquiries in Law* 9, no. 2 (2008): 573–607.

accommodate and create respect for religious and cultural differences between people and expect the state and its legal system to respect these differences.⁶⁵

Drawing upon insights of critical theory, human rights scholars, speaking for the cause of non-western cultures, have highlighted how the human rights enterprise based on the Enlightenment philosophy generated the ‘cult of modernisation’, which resulted into a ‘dualism between progress and backwardness that has been damaging to non-modernising people.’⁶⁶ Such deconstruction highlights the hegemonic suppression of non-western cultures by Europeans during the colonial period and by indigenous elites during the post-colonial period.⁶⁷ Explaining the reasons underlying the divide between universalism v cultural relativism within human rights discourse, Pollis states,⁶⁸

The dialogue between universalism and cultural relativism has been hampered by its neglect of an important analytic dimension. For most human rights scholars, Western ontology sets the conceptual framework for understanding the world. This is the case not only for Western analysts but for many scholars from non-western societies who have internalised Western thought. Hence the portrayal of social reality and the evidence amassed to validate it is filtered through the lens of this framework and its attendant paradigm. Albeit an abstraction, the construction of social reality by social theorists is inevitably selective and attends to only those aspects and that

⁶⁵ Some prominent examples from such works are: Menachem Mautner, “From ‘Honor’ to ‘Dignity’: How Should a Liberal State Treat Non-Liberal Cultural Groups?,” *Theoretical Inquiries in Law* 9, no. 2 (2008): 609–32.; Anne Griffiths, *Review: Remaking Law: Gender, Ethnography, and Legal Discourse: Reviewed Work: Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court*, by Susan F. Hirsch, *Law & Society Review* 35, no. 2 (2001): 495–509; Shefali Desai, “Hearing Afghan Women’s Voices: Feminist Theory’s Re-Conceptualization of Women’s Human Rights Notes,” *Arizona Journal of International and Comparative Law* 16 (1999): 805–44.; Roger B. M. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press, 1989). ; Nancy Kim, “Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism,” *Columbia Human Rights Law Review* 25 (1993): 49; Ayelet Shachar, “Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies,” *McGill Law Journal* 50, no. 1 (2005): 49–88 ; Ann Laquer Estin, “Unofficial Family Law,” *Iowa Law Review* 94, no. 2 (2009): 449–480.

⁶⁶ Preis, “Human Rights as Cultural Practice.” At p. 287

⁶⁷ Comaroff, “Colonialism, Culture, and the Law.”; Merry, “Law and Colonialism.”

⁶⁸ Adamantia Pollis, “A New Universalism,” in *Human Rights: New Perspectives, New Realities*, ed. Adamantia Pollis and Peter Schwab (London: Lynne Rienner Publishers, 2000), 9–30. (At p. 13)

evidence deemed significant and consonant with its paradigm. Concepts or data external to the prevailing paradigm are frequently overlooked. A theoretical consequence of this cognitive framework is that Western ontology becomes the referent whereby non-western cultures and societies are understood and acquire meaning. Using a Western referent has led inevitably to the dichotomization between universalists and cultural relativists.⁶⁹

In their attempt to transcend the opposition between culture and rights, the scholars are also willing to acknowledge that lack of understanding amongst social scientists about both the notions- the notion of culture as well as of rights- has been responsible for, what is now perceived as, the unfortunate and ill-conceived debate between tradition and modernity or culture and rights. There is also a wide consensus about the requirement of re-conceptualising the notions of culture as well as of rights.⁷⁰ Scholars have argued that labeling of the east as traditional or backward and the west as modern or progressive is based on a wrong understanding about the notion of culture.⁷¹ Scholars now aim to promote the understanding that

⁶⁹ For expression of similar view with respect to law see Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Japan: Tokai University Press, 1989). Also see J.Duncan M. Derrett, "Translator's Preface," in *The Classical Law of India*, by Robert Lingat (USA: University of California Press, 1973), vii–xi. Expressing need for cultural and religious sensitivity already in 1970s Derrett noted,

The world has awakened to the intellectual value of non-western thought. Non-Christian is no longer anti-Christian. The world of ideas as well as the world of space has become perceptibly smaller. Asians, whether in Asia or in Europe and Africa and America, make their contributions to life and to intellectual endeavour. They need to understand their own culture; and we need to understand them. Previously we had the advantage of possessing fluent accounts of Indian culture from Indians; but they were couched in language which borrowed far too much from our own environment. In order to communicate with us, they borrowed more than our language. (At p. x)

⁷⁰ Griffiths, "Remaking Law.,"; Richard Falk, "Cultural Foundations for the International Protection of Human Rights," in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi Ahmed An-Naim (Philadelphia, USA: University of Pennsylvania Press, 1992), 44–64. Emphasising the importance of cultural sensitivity Falk states,

Without mediating international human rights through the web of cultural circumstances, it will be impossible for human rights norms and practices to take deep hold in non-western societies except to the partial, and often distorting, degree that these societies- or more likely, their governing elites- have to some extent Westernized. At the sametime, without cultural practices and traditions being tested against the norms of international human rights, there will be a regressive disposition towards the retention of cruel, brutal, and exploitative aspects of religious and cultural traditions. (At p. 46)

⁷¹ Preis, "Human Rights as Cultural Practice." Preis argues that in contrast with the "classic view" which posits culture as a self-contained whole made up of coherent patterns, the culture must be conceived of "as a porous array of intersections where distinct processes crisscross from within

the east and the west or different cultures in the world, all are open and dynamic entities, which have constantly been adopting new values and have been learning new ways of understanding life from each other.⁷²

One of the most important changes in scholarship in the recent years has been that along with cultures, there has also been a great emphasis on the necessity for rethinking of the concept of rights.⁷³ Many scholars now suggest that in order to transcend the opposition between rights and culture it is important that we also challenge the ways in which we have been thinking about the concept of rights.⁷⁴ According to some works rights are to be seen as cultural processes.⁷⁵ Scholars argue that an analytical concept of culture which emphasizes process, fluidity and contestation can be a particularly useful tool for understanding rights. It has been suggested that the pursuit of human rights should be approached as a cultural process, 'which impinges upon on human subjects and subjectivities in multiple and contradictory ways'.⁷⁶ Preis contends that culture is to be seen 'as a network of

and beyond its borders" (At p. 298). Sally Engle Merry, "Changing Rights, Changing Culture," in *Culture and Rights: Anthropological Perspectives*, ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 31–55. Merry argues that "far from being homogenous, uncontested, and self-evident entities both concepts are historical, fluid and contested and they have been and are continually changing" (At p. 31). Therefore, in its re-conceptualised form culture appears as fluid, dynamic, open ended and heterogeneous entity as opposed to the earlier vision, often addressed as essentialistic, wherein cultures were to be seen as rigid, static, closed, homogeneous and internally coherent entities.

⁷² Williams, "Democracy, Gender Equality, and Customary Law." Also see Volpp, "Talking Culture."; Powell, "Lifting Our Veil of Ignorance."; Nussbaum, *Women and Human Development: The Capabilities Approach.*; Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies."; Anne Griffiths, "Gendering Culture: Towards a Plural Perspective on Kwena Women's Rights," in *Culture and Rights: Anthropological Perspectives*, ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (UK: Cambridge University Press, 2001), 102–26.

⁷³ Karen Engle, "International Human Rights and Feminism: When Discourses Meet," *Michigan Journal of International Law* 13 (1992): 517–610. Also Dan Danielsen and Karen Engle, eds., *After Identity: A Reader in Law and Culture* (Routledge, 1995).

⁷⁴ Douzinas, *The End of Human Rights*. Offering a critique to the concept of rights, Douzinas mentions,

The use of rights discourse to describe normatively a conflict or a set of claims is a limited way of narrativising the situation. It is cognitively inaccurate and morally impoverished: inaccurate because it represents a limited way of the world as complete, because it assumes that the various claims, interests and specificities of the parties can be translated into one common language. (At p. 251)

⁷⁵ Merry, "Changing Culture, Changing Rights." (At p. 39)

⁷⁶ Cowan, Dembour, and Wilson, "Culture and Rights," 2001. (At p. 3)

perspectives, or as an ongoing debate.’⁷⁷ Questioning the hitherto prevalent practice of labeling the supporters of human rights as ‘progressive’ and those resisting it as ‘anti-progressive’ many authors rightly argue that such an impulse to label ‘simply obscures a complex contestation within community over its identity and the nature of claims that it generate, as well as over tactics and goals’.⁷⁸

Most scholars now agree that the opposition between rights and culture can be bridged by accepting that the local concerns shape how the universal categories of rights are implemented, resisted and transformed. In the same manner rights discourse, it is claimed, has the potential to respond to the local norms. As Merry suggests that this new understanding of both the concepts can help us better appreciate how local human rights activists are struggling to create a new space which incorporates both cultural differences and transnational conceptions of human rights.⁷⁹ Criticising the earlier binary framework for understanding rights and culture Merry writes,⁸⁰

Posing the choices in such a dichotomous way ignores the extent to which activists, local people and scholars have negotiated these contradictions and redefined both the meaning of rights and the meanings of culture.⁸¹

With significant changes in scholarship across different disciplines about concepts of culture and rights, most rights scholars and activists do not seem any longer interested in making allegations against supporters of cultural diversity for being

⁷⁷ Preis, “Human Rights as Cultural Practice.” (At p. 287)

⁷⁸ Engle, “Female Subjects of Public International Law.” Cowan, Dembour, and Wilson, “Culture and Rights,” 2001.(At p.10).

⁷⁹ Merry, “Changing Culture, Changing Rights.”

⁸⁰ *ibid.* At p. 32

⁸¹ Highlighting the changing nature of human rights Merry points out,

Over the past fifty years, the concept of human rights has shifted from its original meaning, rooted in liberal theory, of civil and political rights to an expanded notion of collective, cultural, and social and economic rights. The present system was born in radical French revolutionary thought at the end of eighteenth century, but by the end of the twentieth, the new human rights system had become the preeminent global language of social justice. As human rights has gradually displaced socialism and communism and it has incorporated some of the features of this ideologies, including economic and social rights to work and healthcare. In response to the demands of indigenous peoples, among others, human rights now include rights to culture. (*ibid.* At p. 38)

insensitive and indifferent towards oppression and suffering. Neither do those who favour cultural diversity appear inclined to make allegations against rights scholars for perpetuating Euro-centrism.⁸² The dilemma of whether to introduce the western concepts of human rights or rule of law in non-western societies, which consumed maximum scholarly energies and resources in the last century, is gradually becoming irrelevant for the social science scholarship. Instead, given the fact that language of rights is deployed in all non-western cultures no scholars, not even those who invoke importance of cultural diversity, want to reject the requirement of legal reforms that introduce various rights for women and for individuals. At the same time, in the present era of globalisation more rights scholars or activists are reluctant to admit explicitly that the State and its legal system should be used to impose western values into non-western cultures.⁸³

According to contemporary scholarship, what needs to be given up is the practice of tracing the modern concepts of human rights and rule of law to one particular culture or civilisation.⁸⁴ Although there is a divergence of opinions amongst scholars about the relationship between cultural diversity and rights, especially women's rights, there has emerged, as it appears from the recent literature, a broad consensus about some issues. Most of the contemporary scholars do not want to waste their energy and resources in debating the origin of the concepts of human rights or of rule of law. Naming such practices as Eurocentric and hegemonic, the new generation scholars, in the increasing globalised world of today, prefer to abandon the categories such as the traditional, backward East or the modernistic, progressive West.⁸⁵ Contemporary scholars prefer to build on the understanding that human

⁸² For discussions on emergence of a section of 'pro-rights anthropologists' see Engle, "From Skepticism to Embrace."

⁸³ For a detailed description see, Cowan, Dembour, and Wilson, *Culture and Rights*, 2001.

⁸⁴ Preis, "Human Rights as Cultural Practice."; Catherine Powell, "Introduction: Locating Culture, Identity, and Human Rights," *Columbia Human Rights Law Review* 30 (1999): 201.

⁸⁵ Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994). Preis, "Human Rights as Cultural Practice." Suggesting a new approach towards human rights Preis states

Just like the notion of development, the idea of (a) human rights practice needs "deconstructing," to use a postmodern term, so that it is seen for what it is- an ongoing, socially constructed and negotiated process- not simply the execution of an already specified plan of action with expected outcomes. (At p. 313)

rights, rule of law are universal values and that all cultures and societies must strive to realise these values through a combination of legal and non-legal means. Today's scholars want to dedicate their energies in ensuring that modern States and their legal systems protect rights of the people in ways that celebrate a range of differences amongst people based on caste, class, sex, religion, ethnicity, and sexual orientation. However, the challenge, today, is to find means to localise these global values.⁸⁶

All the above changes in recent scholarship are indeed welcome changes. As the above discussion has highlighted there is now rich literature available, which make it possible to understand in what sense the concepts such as concept of rights and rule of law can be considered as western concepts. There are enough insights available which emphasize the necessity of going beyond a western frame of reference for making sense of non-western traditions.⁸⁷

During last few decades there has been increasing support from scholars for the idea that the colonial rule had a detrimental influence on non-western societies. The changing relationship between law, traditions and rights is now a widely accepted global phenomenon, howsoever limited it maybe. Whether it is feminist scholars or the rights scholars in general, nobody questions the idea that 'evolutionary theory of progress'⁸⁸ gave rise to ill-conceived binary oppositions between the tradition and modernity or the east and the west. It is also a widely supported idea that the law and rights discourse have been means for curbing differences between individuals and for perpetuating a colonial hegemony on non-western societies.

⁸⁶ Preis, "Human Rights as Cultural Practice."

⁸⁷ Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," in *Humand Rights: Cultural and Ideological Perspectives*, ed. Adamantia Pollis and Peter Schwab (NY, USA: Praeger, 1979), 1–18.

⁸⁸ For a detailed description of 'evolutionism' or 'evolutionary theory of progress' see Norbert Rouland, *Legal Anthropology*, trans. Philippe G. Planel (London: The Athlone Press, 1994). (Pp. 19-36). Explaining the term 'evolutionism', Rouland mentions,

Evolutionism may be briefly described as a theory in which all human societies pass through identical stages in their economic, social and legal development. (At p. 24)

With respect to traditional and modern societies evolutionism has been defined as,

Evolution is a passage from a relatively undefined and non-coherent homogenous state to a relatively well-defined and coherent heterogenous state, through successive stages of differentiation and integration. (Rouland.)

Even in countries like India, where some legal scholars have been skeptical about the relevance of critical theory for Indian socio-legal discourses,⁸⁹ it is no longer possible to overlook insights which highlight the ‘myth of modernity’⁹⁰ and offer incisive deconstruction to the idea of modern law as a rational, autonomous and objective force.⁹¹ It is not possible to overlook the assertions that the prevalent understandings about indigenous traditions in India, which were considered natural and immutable, are result of over-emphasis on one aspect of the traditions in a context of civilisational encounter.⁹² Above assertions are important as they not only

⁸⁹ For Indian scholars’ skepticism towards critical theory in general and critical legal theory in particular see Amita Dhanda and Archana Parashar, *Decolonisation of Legal Knowledge* (Delhi: Routledge, 2012). Calling Critical Legal Theory as ‘the scholarship of privilege’ Prashar and Dhanda state that

the content, style and message of most of the scholarship in critical legal theory are not concerned with the issues of most immediate significance in Indian or other non-western societies. (At p. xi)

Also, Ryan C. Gaglio, “Book Review: Ratna Kapur’s *Erotic Justice: Law and the New Politics of Postcolonialism*,” *Yale Journal of Law and Feminism* 17, no. 2 (2005): 517–25. For skepticism against critical theory and also for the possibilities of converting postmodernist insights into positive feminists legal projects also see, Eichner Maxine, *On Postmodern Feminist Legal Theory*, 36 *Harv. C.R.-C.L. L. Rev.* 1, 2001.

⁹⁰ Peter Fitzpatrick, *The Mythology of Modern Law* (London; New York: Routledge, 1992).

⁹¹ While this faith in law persisted for a long time, the post-colonial scholarship points towards the tendencies for Occidental hegemony involved in this projection of law as omnipotent. See Fitzpatrick. Offering incisive critique to idea of modern law Fitzpatrick points out

Along with generality of its sanctioning force, law demands ‘that all sectors of society abandon their autonomy of legal interpretation (that is, the extent of their obligation) in favour of a single interpretative authority’. Thus we have replicated in law the ‘Christian axiom that custom, history, tradition, were to be conquered in their effectiveness by the word- and the law’. ... What is more modern law could re-shape the conquered could release norm-contents from the dogmatism of mere tradition and.... determine them intentionally. ... The legal subject emerges out of this paradoxical privatism not only as the abstract bearer of legal rights and duties but also, as the possessor of a specific Occidental identity not unlike that possessed by the subject of the Christian god. (At p. 57)

Also see Rudolph and Rudolph, “Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context.” Representing an important shift from pre-1990s scholarship authors mention,

The liberal and progressive dream that it is fate of difference to fade and for humanity increasingly to repair to a common mold, and the additional dream of rationalists that it is the fate particularly of religion to fade away in face of the triumph of modern science, have receded in last two decades not only in India but the wider world. (At p. 56)

⁹² For a similar view in the Sri Lankan Context see Radhika Coomaraswamy, “To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights,” in *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Pennsylvania: University of Pennsylvania Press, 1994), 40–57.

emphasize the need for questioning scholars' understandings about indigenous traditions, they also open the way for deeper engagement with indigenous traditions.

Theoretical developments at the international level, especially with regards to insights in critical theory, carry a promise to acknowledge and rectify the mistakes of earlier streams of rights scholarship, in order to better serve the cause of protection of rights of individuals, especially women. All the above attempts in inter-disciplinary scholarship to rethink the concepts of culture and rights represent significant steps forward from a situation wherein options for scholars were limited to choosing between one of the mutually opposing camps of culture and rights. These insights, if translated adequately into practice, can go a long way in addressing the opposition between culture and rights, and eventually in finding answers to more specific questions like the limits of the State and its legal system in regulating family matters to ensure women's empowerment.

While emerging concern for rethinking relationship between rights and culture is a welcome change, an important question is: what are the implications of this change for cause of women's rights in different parts of the world. In other words, have all the new insights about the concepts of law and rights, about the nature of colonial rule and its interactions with the non-western traditions have actually remoulded the nature of dominant socio-legal discourses in specific national contexts? Has it actually become possible for scholars and activists to address the colonial legacy of opposition between the tradition and modernity? Is there now available some indigenous versions of legal feminisms, which suggests a new "path of progress" wherein eradication of influence of traditions from law and social life will not be an essential requirement for women empowerment in India?

This study is an attempt to seek answers to the above questions. It uses example of changing nature of women's rights discourses in India and draws attention towards scholarly attempts in India to keep pace with changing perceptions towards the issue of the relationship between law and cultural diversity at an international level. The study undertakes a critical analysis of recent streams of socio-legal discourses concerned with rights of women in the domain of marriage and family, to

understand the implications of international developments in specific legal contexts like India. While considering the increasing influence of international developments on Indian socio-legal discourse as an important change, this study argues that the changing perception in scholarly and activists' discourses towards the nature and role of law have not resulted in addressing the colonial legacy of antagonism between law, rights of women and traditions.

1.3 Aims and Scope of the Study

This study is an attempt to address an old but highly contentious issue of the relationship between law, gender justice and cultural diversity. A matter of concern for legal systems all over the world, the above issue has been a matter of particular concern for the legal systems of Asian and African countries, for more than two centuries. Using example of India, this study aims to explore ways for the State and its legal system to protect rights of women while being sensitive towards cultural or religion based differences between them.

In recent times, legal systems all over the world are marked by increasing concern about human rights and compliance with international norms. At the same time, another massive and difficult challenge is - to protect the rights of women while being or remaining sensitive to locally-rooted practices, particularly in family matters. While balance between rights and cultural diversity may be a predicament in late modern or even postmodern conditions all over the globe today, in ex-colonial, developing countries like India, the dimensions of this and the extent of the resulting tensions are mindboggling. However, in recent years two things have become far too clear: that the law, in all parts of the world, exists in close connection with values, ideologies, cultures or religions and that seeking separation between the law and its cultural moorings may not result into women's empowerment.

This study aims to understand implications of the realization about the connection between law and culture on socio-legal discourses concerned with rights of women in India. It aims to explore whether the above-mentioned realizations have triggered scholarly efforts to rethink the colonial legacy of antagonistic relationship between law, rights of women and cultural diversity in India.

This study divides Indian socio-legal discourses into two broad phases- the pre-1990s and the post-1990s phase. It argues that a main characteristic of the pre-1990s phase was: full faith in potential of the State and its legal system in neutralizing influence of traditions even from the domain of family and thereby ensuring women's empowerment. In the pre-1990s phase, scholars' and activists' demand was to transfer complete control of personal, intimate relationships to the State. The post-1990s phase, on the other hand, is about advocating a limited role of the State and its legal system in dealing with family matters. An important and specific area of change is: the demand for a limited role of the state and for more freedom to individuals, at least, in relation to formation and dissolution of personal, intimate relationships. Moreover, in the pre-1990s phase, scholars' and activists' expectations from the State and its legal system was to protect rights of women while being neutral towards differences between women based on caste, ethnicity, religion, sexual orientation. Adopting a different approach, in the post-1990s phase, the expectation is that the state and the law should protect rights of women while being sensitive towards differences between women. This study undertakes critical analysis of some works from the post-1990s phase with an aim to understand two important issues: first, whether recent changes in the scholarship also indicate changing perceptions towards ancient traditions and ancient phenomenon of cultural and legal pluralism. Second whether these changes have resulted into offering new tools for the Indian State to deal with culture and religion based differences between women. It uses example of a recent legislation- the Protection of Women from Domestic Violence Act, 2005. (The 2005 Act, hereinafter.) A direct consequence of lobbying by women's rights scholars for more giving freedom to individuals in personal, intimate relationships, the 2005 Act protects rights of women in those relationships which cannot be considered legally valid marriages. Using example of the above Act, this study aims to show that recent shift in women's rights discourses, far from offering better tools for Indian legal system to protect rights of women while being sensitive to cultural diversity, is becoming more a reason for denial of rights to women.

Using example of the 2005 Act and socio-legal discourses in India, the objective is to challenge the colonial era framework of foregone conclusions concerning law and society in India within which the contemporary national and international discourses for women's right seem to be trapped. This framework dictates that women's emancipation cannot be conceived in a society which gives importance to institution of marriage and wherein marriage is considered a sacrament. According to this framework Indian society is to be seen as backward, highly patriarchal, and unfavourably disposed towards women and the issues of women's rights. It is believed that women's empowerment is a far-fetched dream in India since Indian legal system, especially its judiciary, due to strong influence of religion and traditions, especially Hindu traditions,⁹³ continues to give importance of the institution of family and reinforce the idea of marriage as sacrament.⁹⁴ This framework has always dictated that women's empowerment in India can be a reality only when law and society gives more importance to individual and not to the institution of family and when marriage is seen as a contract between two individuals and not as a sacrament.

This study makes an attempt to show that different streams of women's movements in India need to break free of this derogatory and limited framework in order to promote their stated purpose of enhancing gender justice. It focuses specifically on Hindu traditions and Hindu family laws and their relationship with gender justice. The study argues that the dominant discourses of Indian women's rights are misguided, and that their struggle is being pursued on the basis of colonial misconceptions about Hindu traditions and Hindu society's understanding of the notion of rights and the law, and therefore of its relationship with the state and its legal system. Based on crucial misunderstandings of Indian society, scholars and

⁹³ It is true that India is a multi-religious country. While all religions are alleged to be discriminatory against women, the post-1990s scholarship in India criticizes strong influence of majority 'Hindu ideology' as the main reason responsible for denial of rights to women. For example, see Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*; Ratna Kapur, "The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India," *Cleveland State Law Review* 47 (1999): 323–33; Agnes, *Family Law Volume I*.

⁹⁴ For strong criticism of Indian judiciary and legislators for giving importance to institutions of family and marriage see Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*; Also, Agnes, *Family Law II*, 2011.

activists have been harbouring, perhaps inadvertently (but probably not by accident), unrealistic and uncalled for aspirations regarding Indian society. These serve to impose colonial, modernist and allegedly universal notions of 'emancipation' and models of progress, manifesting themselves in law as well as through the relationship between law and society, and leading to particularistic understandings of rights as the basis of organisation of a developed society. Based on crucial misunderstandings, scholars and activists have been imposing on Indian society a foreign understanding of the relationship between the State, law and religion. Thus, they have been stalling social change by imparting rigidity and inflexibility to Indian traditions, which has been foreign to them.

People in India, like in most parts of the world, continue to refuse to succumb to the might of the State and its legal system, when it comes to personal or intimate relationships. It is high time that the women's rights scholarship becomes cognizant of socio-legal reality in India by moving away from the rather simplistic approach that it is within the powers of the state to regulate the field of marriage. Reluctance of scholars to appreciate socio-legal reality in India, to take a clear stand on the role of the state in regulating personal matters has already led Indian legal system into great chaos and confusion.⁹⁵

Currently India has laws which create an impression of giving full control on family relationships either to the State or to the religion-based norms. There are laws which prescribe specific conditions for valid intimate relationships based on religions, impose monogamy,⁹⁶ criminalise polygamous and adulterous relationships⁹⁷, and

⁹⁵ An important milestone in the legislative history of India which aims to broaden definition of marriage is the Protection of Women from the Domestic Violence Act, 2005. While this legislation is celebrated as one of the important milestones in the history of women's movement in India, there exists lack of clarity amongst scholars as well as amongst judges, about something as fundamental as the meaning of key terms like 'relationship in nature of marriage' and 'live-in relationships'. There has not emerged so far any guiding framework for understanding the relationship between institutions of the family and marriage and live-in relationships. Amongst scholars themselves there is extreme divergence with respect to issues like criminalisation of polygamy and adultery or on the extent of state control on formation and dissolution of personal relationships. For a detailed discussion see Nidhi Gupta, "Women, Family Laws and Informal Relationships in India: The Domain of Confusions and Misunderstandings," in *Quest for Justice: Collection of Essays*, ed. K.N.C. Pillai (Bhopal: National Judicial Academy, 2012).

⁹⁶ Section 5, the Hindu Marriage Act 1955.

which prescribe a particular legal age for sexual intimacy.⁹⁸ In addition to the above, there is still a section of women's movement in India⁹⁹ which continues to make demands for a legislative enactment which prescribes compulsory registration of marriages as a pre-condition for a valid intimate relationship. Quite ironically, at the same time there has emerged on the horizon a new legislation- the Protection of Women from the Domestic Violence Act, 2005, which has been celebrated by feminist scholars and activists as a extremely progressive piece of legislation. This law is expected, howsoever misleadingly, to eliminate differences between formal marriage relationships and informal live-in relationships and legitimise all kinds of intimate relationships irrespective of religion, caste or customs. Furthermore, on one hand there have been demands for raising the age of consent for sexual relationships with an aim to protect young women and there is a statute which makes marriage below the age of 18 years a punishable offence.¹⁰⁰ On the other hand there are more and more cases coming before courts of young (minor, below 18) boys and girls eloping or secretively getting married or establishing intimate relationships and demanding their right for sexual freedom.

With prevalence of the above contradictions in the Indian legal system the cause of women's rights in India is gradually becoming a completely subjective exercise dependent on personal ideologies and moralistic views of judges.¹⁰¹ It is important

⁹⁷ Sections 494 and 497, Indian Penal Code, 1860

⁹⁸ The age of consent for sexual relationships is now 18 years. Various statutes which prescribe age of consent are: The Indian Penal Code, 1860; The Prohibition of Child Marriage Act, 2006; The Juvenile Justice (Care and Protection of Children) Act, 2015; The Protection of Children from Sexual Offences Act, 2012. While age of consent for marriage was fixed at 18 years, the Indian Penal Code, 1860 by virtue of its Section 375 allowed sexual intercourse with a girl between 15 to 18 years. However, the above provision was struck down recently by the Supreme Court in October 2017 the case of *Independent Thought v Union of India*, No. W.P.382 of 2013 (Supreme Court October 11, 2017).

⁹⁹ This demand can be considered more an official demand as it is a strong demand from the National Commission for Women, an autonomous but government funded body at the national level.

¹⁰⁰ *Supra*, fn 100

¹⁰¹ Pooja Badarinath, "The Challenge of Subjectivity Within Courts: Interpreting the Domestic Violence Act," *Economic and Political Weekly* XLVI, no. 12 (2011): 15–18. Also see Gupta, "Women, Family Laws and Informal Relationships." Despite the fact that the judiciary has always been making efforts to deal with pluralistic relationships its approaches are marred by a high degree of inconsistency. Thus, at the level of case law what we have is a completely confusing series of cases from different High Courts, from judges of the same High Courts, and

that socio-legal scholarship focused on India also own responsibility and take cognizance of the fact that misunderstandings perpetuated by scholarly writings and official discourses about non-western traditions, about the nature and role of law, and also about the relationship between law and religion, law and cultures in India is one of the important reasons that has led the Indian legal system to the current chaos. It is also imminent that efforts are made to re-appreciate the role of the state and its legal system in governing personal or family relationships in India. It is also perhaps time to go beyond the usual distrust against society, religions, cultures and communities, which has been the main characteristic of socio-legal scholarship and which has created a situation where the issue of rights of women is about making choices amongst evils since we can neither trust the society nor the state.

This thesis argues that the assumptions underlying women's rights discourses and their impacts are designed to create a futuristic society based on a different worldview than that held by the majority of common Indians today. Such a modernistic vision of society, nurtured and propagated by the majority of Indian academics, does not match with the idealistic visions of a good life held by the majority of India's population. Rather than accepting the prominent argument that Indian society urgently has to change, main contention in this study is that there is a pressing need to modify and diversify academic and elitist thinking about postcolonial development in the Asian and African countries. Taking India and its Hindu law and traditions as an example, the general aim is to claim a recognised space for elements of tradition as part of the present and future, and to argue for the constructive application of legal pluralism for the purposes of securing gender justice in family matters. The goal is also to show through this study that family laws in respect of gender justice cannot be placed on a linear continuum with religious or tradition-based laws appearing on one end and statutory reforms ensuring equal legal rights at the other end. In other words, while not idolising the past, the thesis argues that building a sustainable and gender-sensitive future requires not only innovation and modernisation but also continued reliance on useful elements of traditional models.

also from the Supreme Court, which offer deeply conflicting and divergent opinions on the issue of rights of women in personal relationships.

Emphasizing upon necessity of rethinking the relationship of opposition between tradition and modernity, this study argues that revisiting this distinction is necessary to take cognizance of the fact that scholars' and activists' fight against Indian traditions has been a fight against an imaginary monster, which does not actually exist in the form, it has been imagined to exist. There is a need for realization that traditions are not as big hindrances for the cause of women's rights as they are made out to be. There are undoubtedly practices across different religions,¹⁰² although claimed by many to be integral to their religions or the traditions, which need to be addressed through a combination of legal and social measures. However, it also needs to be understood that neither can non-western traditions be reduced to some specific practices like polygamy, dowry etc. nor legal abolishing of such specific practices would not mean making traditions march towards modernity.

The cause of women's rights has suffered due to the fact that Indian family law and the connected scholarship remains mentally imprisoned by the colonial experience. Trapped within colonial framework for social change, scholarly and activists' discourses have not taken sufficient account of how average Indians deal with their family affairs by keeping a cautious distance from state-centric regulation, continuing to follow religious and customary norms to regulate their affairs. Given the size of India and the enormity of the challenges this would put for any state-centric form of regulation, it is now time to recognize that the state ought to stand back and let society's self-regulation be more profoundly recognized. The state may play the role of a sensitive supervisor which facilitates growth and development of different cultures as well as of individuals, protecting their basic rights, but

¹⁰² Common examples of such practices for Hindus are: *Sati* (the practice of women sacrificing herself on husband's pyre), child marriages, dowry, prohibition against widow remarriage. In case Muslims much criticized practices are: polygamy, *triple talaq*- customary practice of unilateral divorces by Muslim men pronouncing a word *talaq* (literally meaning divorce) three times. While debate relating to abolition of '*triple talaq*' is a live debate in India even at the time when this study is being finalized, other practices have either been abolished or regulated through legal reforms. However, none of the above can be said to have diminished the importance of traditional values of considering family as a basic unit in society or perceptions of marriage as sacrament at least among Hindus. None of the above legal measures can be said to have made Indian society reach a stage where individual is considered a basic unit in society, or marriage is seen merely as a contract, or laws made by the state are the only set of laws governing family matters in India.

otherwise letting them negotiate the conditions of their relationships with others. It will not amount to giving unbridled authority to different caste or religion based communities over individuals. It will also not amount to expecting the State to play the role of a silent spectator or that of a mere umpire, while letting the multiple norms and pluri-centric forums regulate all aspects of family relationships without any concern for women's welfare, women's empowerment and women's rights. India has a Constitution, which provides the broad framework of benchmarks, but just as much as the basic guarantees of this Constitution are not equally effective for all citizens of India, they cannot have the effect that all individuals in India, when it comes to family relationships, can be on a footing of absolute equality. Instead a stand in favour of limited role for the state would permit and ground a policy suggestion for more explicit recognition of equity rather than equality, of Indian traditions, traditions based institutions of marriage and family in the Indian legal system without sacrificing the cause of women's dignity.

This kind of argument is not a call for a return to medieval conditions, instead it permits and grounds a policy suggestion that more explicit recognition of pluri-legality in the Indian legal system would be good for strengthening the rule of law in India. It is time, this study argues, to break free of the shackles of colonial presumptions and take note of culture specific elements such as, concept of cosmic order, idea of Universe as a self-controlled order, interconnectedness between every individual and micro cosmic and macro cosmic orders- which continue to influence the legal system in India. The cause of women's rights requires efforts to appreciate concept of *dharma* as an inherently plural entity or institutions of family and marriage as pluralistic institutions.

Taking example of India and Hindu traditions, this work is an attempt to appreciate the possibilities so that the state in India can undertake the task of protecting rights of women without having to be an instrument for neutralizing the influence of traditions and religion from society. The attempt is to explore the possibility of developing a women's rights discourse which does not perceive traditions, and the institutions of marriage and family, as sources of oppression for women. Undoubtedly, a women's rights discourse rooted in traditions will have to be a

discourse which goes beyond the comfort of binary categories like family and individual, sacrament and contract, religious and secular, custom and law- where everything on the left side of the divides can be seen as causes of women's oppression, whereas the elements on the right side can be seen as the solutions to deal with oppression. It will have to be a discourse which questions the colonial era notions of progressiveness, wherein progressiveness is attributed only to a society: which has individual and not the family as basic unit in society; which claims to be governed merely by laws promulgated by the State based on individual will and strict separation between religion and law, and where legally enforceable rights are perceived to be the basis of organization of relations between individuals.

An important contention in this study is that the seemingly irresolvable issue of the antagonistic relationship between women's rights and non-western cultures can be resolved only through an acknowledgement of a fact that the concept of rights underlying national and international discourses on human rights and women's rights offers only one way of upholding human dignity. Different cultures in world have nurtured different ways of upholding human dignity, wherein reorganisation of the society around the tenets of 'individualism', 'legalism' and 'rights' is not a necessary condition. The study further contends that the cause of cultural diversity as well as the scholarly concern for improvement in human condition cannot be served either by dismissing the differences between the east and the west or between different cultures as mere colonial constructs or by reducing different cultures and traditions to sheer ephemeral, open and dynamic entities which are constantly undergoing change to abandon old elements and to accept new elements. Instead, concrete steps are required to understand different ways of upholding human dignity nurtured by non-western cultures which ultimately result into different understandings of the notions of law, rights and traditions and ultimately of the issue of relationship between law, traditions and social change.

The thesis argues that in the Indian context, as much as in any other part of the world now, support for plurality also has to mean freedom to maintain one's identity, to be governed by religion and tradition-based norms, especially in matters of personal relationships. For the project of rights of women to become meaningful

in India, it is necessary to work out various options so that women can claim their rights without having to fight against traditions and religion or without having been forced in a situation to choose between their rights and their culture or religion.¹⁰³

1.4 Chapterisation

Aiming to address the issue of the relationship between law, cultural diversity and rights this study is divided into four major chapters. Taking forward the contention that antagonism between law, traditions and gender justice is a colonial legacy, the second chapter, after this introduction, draws attention towards the colonial era presumptions about non-western traditions in general and Indian traditions in particular, and about the concept of law and its relationship with religion, which became responsible for denigration of and antagonism towards non-western traditions. It highlights colonial rulers' perceptions towards the phenomenon of cultural and legal pluralism as well as their understanding of notion of 'progress'. This chapter also draws attention towards the key elements associated with Hindu traditions- the concepts of *dharma* and cosmic order- which got obscured in the process of making sense of traditions in India during colonial rule. Emphasising *dharma* as an inherently plural entity, this chapter also highlights pluralistic nature of the institutions of marriage and family, which has received attention of scholars only recently, despite being given due recognition even in a modern marriage code for Hindus, the Hindu Marriage Act, 1955.¹⁰⁴

The third chapter aims to draw attention towards the changing nature of socio-legal discourses concerned with rights of women in family. Dividing socio-legal discourses in India into two broad phases- the pre-1990s and post-1990s phase, this chapter describes important changes in socio-legal discourses that have occurred in last few decades, as a sign of the increasing influence of critical theory. It shows that while the pre-1990s phase was about absolute faith in the potential of law to bring about fundamental transformation in India, the post-1990s phase has been about challenging the rule of law, enlightenment philosophy, rights discourses,

¹⁰³ Choudhury, "Between Tradition and Progress: A Comparative Perspective on Polygamy in United States and India."

¹⁰⁴ Section 7, the Hindu Marriage Act, 1955.

evolutionary theory of progress- everything that has been considered panacea for progress since the colonial era. Also, while the main concern for pre-1990s scholarship was to highlight the colonial rule as a beneficial legacy, a dominant section of women's rights¹⁰⁵ scholarship after the 1990s has been more concerned with deconstructing what has been referred to as the progressive modernisation myth of the colonial rule. This chapter enlists important changes such as- the changed perceptions about the nature and role of the colonial rule and of law in women's empowerment; changing perceptions towards certain traditional practices, which till recently were considered backward and oppressive towards women such as polygamy and adultery or even customary ways of formation and dissolution of marriages; an increasing concern among legal scholars for differences between women; changing expectations from the law and the State to become more sensitive towards differences between women; shift in perceptions about legal uniformity and the role of the State in regulating family matters, especially formation and dissolution of marriage or marriage like relationships. It brings to forefront scholars' willingness to challenge some of the well-established understandings of the concept of personal laws, and also to question the understandings of *dharma* as a set of immutable rules received from heaven. It draws attention towards scholars' willingness to challenge the colonial legacy of perceiving law as an instrument of social change, and for eradicating the influence of culture and religion. The second section of this chapter considers the significance of recent changes in socio-legal discourses for the cause of women's rights in India. It shows in what sense the recent streams can be considered to be an advance over the scholarship in the pre-1990s phase. It argues that the new stream of socio-legal scholarship in its post-1990s phase is armed with important insights about the relationship between law and religion and law and cultural diversity, which can result into meaningful efforts to rethink the relationship between law, cultural diversity and rights of women. It is an important change that scholars in the current phase are willing to take cognizance of the fact that legislative reforms which granted extensive individualistic rights to

¹⁰⁵ While changing perceptions towards role of the state, law and differences between women is a common feature of women's rights scholarship in India, there have been divergences of opinion among feminists scholars about relevance of above changes for India. Chapter three takes note of the above divergences in section 3.4.1. *infra*.

women have not resulted into diminished importance of the institutions of marriage and family in the Indian society.¹⁰⁶

While the third chapter considers recent changes in women's rights scholarship as important, the fourth chapter aims to analyse the impact of these changes on the issue of women's rights in India. An important aim of this chapter is to understand whether the recent shift actually means efforts by scholars to give up the objective of eradicating the influence of traditions from law and society? The first section of this chapter undertakes critical analysis of some recent works¹⁰⁷ seeking answers to a series of questions: whether recent changes in women's rights scholarship have actually meant going beyond the series of binaries which have been responsible for antagonism between law and cultural diversity? Have we been able to challenge the colonial era presumption that importance to the traditional institution of family and the Hindu ideal of marriage as sacrament are the main reasons for denial of rights to women in India? Do recent changes mean efforts to devise better tools for the legal system in India to strike a balance between traditional values and institutions of marriage and family and rights of women? Do we have better understanding of the concept of *dharma* as an inherently plural concept, something which cannot be reduced to a set of norms received from a definitive source in Heaven? Do we have better understanding of the traditional institutions of marriage and family as pluralistic institutions which cannot be reduced to a single form?

Undertaking a close analysis of recent prominent works, this chapter answers most of the above questions in negative. The fourth chapter shows that recent changes in women's rights scholarship in India, though important, yet do not go far enough to address the colonial era presumptions about the concept of *dharma*, and about the institutions of marriage and family, which were responsible for opposition between culture and rights and between law and cultural diversity. This chapter shows persistence of the binary opposition between tradition and modernity as one of the main characteristics even in those works which otherwise claim the above

¹⁰⁶ *Infra fn.* 271, 273.

¹⁰⁷ *Infra sec.* 1.5

opposition as a colonial construct meant for denigration of non-western traditions. It is true that post-1990s scholarship in India represents significant advancement over earlier streams wherein scholars perpetuated simplistic notions such as replacing religion-based laws with secular laws to eradicate influence of traditions from society. There are many important changes such as, challenge the idea of law as an instrument of progress and to replace it with the idea of law as a process; cognizance to diversity of family forms in colonial India; attention to the fact of legal pluralism in marriage solemnisation especially among Hindus, something which had found acknowledgement and endorsement in the Hindu Marriage Act, 1955 too.

However, despite being important, the above changes, this chapter argues, are not turning out to be beneficial given scholars' reluctance to challenge the following presumptions: (i) that influence of religion or traditions on all spheres of life, including legal sphere is the main cause of denial of rights to women, (ii) that women's empowerment is not possible in a society which gives importance to the institution of family and where marriage is perceived as a sacrament; and (iii) that role of law and the state is to ensure that the individual not family is a basic unit in society and that marriage is treated as a contract and not as a sacrament. There are no efforts to bring to the forefront the concept of cosmic order and associated elements such as- the idea of interconnectedness between individual and visible and invisible spheres, universe as a self-controlled order, *svadharma* (one's own duty)- which impart distinctiveness to religions and traditions in India. There are also no efforts to challenge the colonial era attempts to reduce Hindu marriage to a narrow restrictive definition, wherein legally valid Hindu marriage is reduced to a certain set of specified rituals mentioned in sacred books.

The fourth chapter argues that with recent changes women's rights scholarship in India, far from offering better tools to deal with cultural diversity, is fostering a situation of increased politicisation of rights of women giving rise to a new binary- that of a Hindu majority versus non-Hindu minorities.¹⁰⁸ Instead of efforts which challenge the 'anti-women nature' of traditional institutions of family and marriage,

¹⁰⁸ Archana Parashar and Amita Dhanda, eds., *Redefining Family Law in India* (Delhi: Routledge India, 2009). (At p. ix)

what we have is a scholarship which reduce concepts of ‘marriage as sacrament’, ‘stability of family’, monogamy to nothing more than oppressive Hindu ideals, which were brought into existence by the Hindu majority only during the colonial rule and which are prevalent in contemporary India due to the continuing dominance of the Hindu majority on rest of the Indian population. When it comes to rights of women in intimate relationships, instead of efforts to challenge the restrictive definition of Hindu marriage the scholarship ignores legal pluralism in marriage solemnisation which has been characteristic of Hindu traditions and which was given recognition even under the Hindu Marriage Act, 1955. This reluctance has serious consequences for the cause of women’s rights as has become evident from improper functioning of the Domestic Violence Act, 2005, a legislation which gives evidence of shift in perceptions about limiting the role of the State in regulating formation and dissolution of personal, intimate relationships.

The second section of this chapter uses example of the Domestic Violence Act, 2005 to show that increasing concern for ‘plurality’- for differences among women- and also for limiting the role of the State in regulating personal matters, instead of being beneficial, is becoming a new source for denial of rights to women. Seen as a progressive piece of legislation one of the main objectives of this Act was to protect rights of women who found themselves in diverse kinds of personal relationships, which could not be considered as legally valid marriage. This legislative addition has two important objectives: to protect women against violence and to ensure them economic rights in intimate relationships, irrespective of caste, religion or customs. It also protects rights of women who are victims of the criminalisation of practices like polygamy or adultery. However, despite being an important piece of legislation, this Act, this chapter shows, is becoming a reason for denial of rights to women in absence of actual efforts to (i) take cognizance of *dharma* as a plural concept; (ii) challenge the restricted definition of Hindu marriage which came into existence during colonial rule; and (iii) appreciate the ancient phenomenon of legal pluralism in marriage solemnisation. The Act deploys the term ‘relationship in the nature of marriage’ to protect a wide range of women in intimate relationships. However, despite being in operation for more than a decade, there is no clarity about the

differences between marriage relationships and relationships in the nature of marriage. It has resulted in a situation wherein a relationship between a man and a woman which could earlier be termed as a valid marriage, giving a woman the status and rights of wife, is now termed as only a relationship in the nature of marriage, thereby reducing woman to a 'mere contractual partner' to a man, with no clarity even about nature of this contract and with much lesser rights than that of a wife. Moreover, while socio-legal discourses continue to link women's empowerment with the idea of marriage as a contract, there have been no efforts to deliberate on the nature of this contract. There are no deliberations on important issues such as: how different is this contract from a commercial contract? What should be role of the State in formation, performance and enforcement of these contracts for intimate relationships? And, a consequence of the ignorance towards above vital issues is a deepening crisis in the Indian legal system and also in women's rights scholarship which is gradually making the issue of women's rights a completely subjective exercise dependent on the personal ideologies and moralistic views of judges.¹⁰⁹ The Domestic Violence Act, which represents to a large extent changing perception of scholars towards differences between women, is expected to substitute the personal law systems. Rather than being a legislation which can supplement rights of women in traditional institutions of marriage and family, it appears to be a piece of legislation which aims to devalue the two institutions. While it gives economic rights to women, irrespective of and sometimes in addition to norms based on religion, caste, customs or even secular laws, what is missing in scholarship is a clear deliberation on some vital issues such as, what should be or can be differences between rights of a wife and rights of a partner in a relationship in the nature of marriage. There is, thus, a new conflict of laws arena that has been developing in Indian family law, between the traditional personal status law systems and the new forms of general law regulation in the arena of family law, specifically the Domestic Violence Act, 2005.

The arena of family law is thus a deeply contested field of legal rules. It is no longer just traditional social norms and religious rule systems are calling the shots, but the

¹⁰⁹ See Gupta, "Women, Family Laws and Informal Relationships."

modern state, increasingly under surveillance by international law and normative expectations from the field of human rights is asked to intervene and prove its worth as a regulatory mechanism able to guarantee the basic rights promised by the Constitution. In this deeply contested arena, we see now that simplistic calls for complete state control are just reflections of exaggerated expectations that ultimately, it seems, no state system can fulfill.

It is a situation of great dilemma for the Indian State, because on the one hand it is expected to intervene more strongly in the wake of increasing cases of excesses of communities and families against individuals, against young men and women in the form of “honour killings”,¹¹⁰ or barbaric punishments by caste and community-based dispute resolution forums.¹¹¹ On the other hand, in contrast to the situation till the 1990s, the scholarly faith in the potential of the Indian state and the law to deliver women’s empowerment in India seems to be diminishing, and the state is increasingly expected to play lesser role in regulating intimate relationships.

It has become gradually very clear that in order to ensure better protection of the rights of women, something more is needed than mere realisation amongst a section of scholars that transferring complete control to the State for regulation of family matters is neither feasible nor will it necessarily result in empowerment of women. The requirement is to take a well-considered stand with respect to the issues such as: to what extent should the state and its legal system intervene in regulating family laws in the interest of rights of women and children? Should the state in India give up its control on formation and dissolution of personal intimate relations? Should the state only intervene when there is a complaint that someone’s fundamental rights

¹¹⁰ Brinda Karat, “Honour Killings Are a Separate Horror,” *The Hindu*, March 22, 2016, sec. Lead, <http://www.thehindu.com/opinion/lead/Honour-killings-are-a-separate-horror/article14168010.ece>; Lata Singh v State of U.P., 5 Supreme Court Cases 475 (Supreme Court 2006); “Prevention of Interference with the Freedom of Matrimonial Alliances (in the Name of Honour and Tradition): A Suggested Legal Framework.” (Delhi: Law Commission of India, August 22, 2012).

¹¹¹ “Khap Panchayats,” *The Hindu*, April 16, 2010, sec. OPINION, <http://www.thehindu.com/todays-paper/tp-opinion/Khap-panchayats/article16021026.ece>; Indrani Basu, “9 Things You Need To Know About The Khap ‘Rape Order’ In India,” *Huffington Post India*, September 8, 2015, http://www.huffingtonpost.in/2015/09/08/dalit-girls-india_n_8095322.html.

were violated? Should the state in India continue to recognize cultural and religion based laws and dispute resolution forums for regulation of family matters?

The unfortunate situation is that none of the above questions have attracted attention of dominant socio-legal scholarship in India so far. It is true that the questions relating to the role of the State are not easy to address, nor do they yield to any definitive answers. Considering the complex socio-legal realities of Indian society there can be no fixed formula to determine when and in what matters the State has to intervene and to what extent. But these difficulties are no reason to ignore the above questions or to avoid serious deliberations which can lead towards a well-considered stand on the role of the State in dealing with family matters. The stage has come where there is an urgent need for a fresh analysis on the role of the State in family matters in India, and also to make efforts to develop some kind of legal framework to determine the rights and obligations of individuals in personal relationships irrespective of their form and nature. And a most important step in that direction would be efforts to go beyond the usual distrust against society, against religions, cultures and communities, which has been the main characteristic of the large majority of socio-legal scholarship focused on India. It is thus argued here that this negativity against and virtual dismissal of ‘tradition’, ‘culture’ and ‘religion’ has been the main reason which has prevented scholars and activists from engaging in serious deliberations on the role of the State. It has also been one of the main reasons for privileging state and its legal system for protection of rights of women.

An important requirement, therefore, is to challenge the perceptions of antagonism between traditions and rights of women. And challenging those perceptions would require changing the way the distinctions between tradition and modernity are understood. It requires challenge to the understandings that traditions or religions are about suppression of human will and human agency and that it is only a modern secular State, which can allow human beings to be fully human. In the Indian context, changing perceptions towards role of the State and its legal system requires efforts to rethink relationship between law and society. And, this is what chapter five sets out to do.

This chapter aims to suggest some initial conceptual steps which need to be undertaken at scholarly level to start addressing the confusions in Indian legal system about role of law and state in regulating personal relationships. It argues that two important steps for addressing the said crisis are to: (i) rethink our ways of understanding distinction between tradition and modernity, (ii) become aware of those elements, which render the concept of human rights or women's rights a western concept, and (iii) appreciate those elements which impart distinctiveness to indigenous worldviews without making them antagonistic to the cause of women's rights or human rights. This chapter argues that rethinking role of the State and law in women's empowerment needs challenging following understandings: that traditions, and traditions based values such as, importance to institutions of marriage and family, conception of marriage as sacrament are about suppression of individual will and denial of rights to women; that women's empowerment seems to be a possibility only in a society where individual is a basic unit in society, where marriage is treated as a contract and where the state and the legal system can be shown to be purged of influence of religion and traditions.

It further argues that trapped within colonial era framework of social change, scholars have not been able to appreciate the fact that an important difference between tradition and modernity is not about accepting or rejecting the very idea of rights. In contrast it is about rejecting that idea, where legally enforceable rights are the only reason for relationships between individuals. It is about two different worldviews: one which perceives a relationship of opposition between family, community, religion and individual and rights therein are therefore, means for protection of individual against family, community, culture or religion; and the other, which perceives a relationship of symbiotic co-existence between individual and family, community, religion or culture and rights therefore are means for developing one's individuality while performing one's duties towards family, community or religion. Relationship between tradition and modernity is about different understandings of the concepts of law, religion, and rights and of the relationship between individual and the Universe/ the Cosmos. Understanding these

differences can be the only key for understanding and appreciating legal developments in India and can be the only way to address the rights issues in India.

The main requirement, this chapter argues, is to understand those traditional values which continue to influence what looks like a modern legal system in India. An important requirement is to take note of various elements related to the concept of cosmic order, such as the idea of universe as a pre-existing web, the concepts of 'interconnectedness', of universe as a self controlled order, importance of *svadharma* (one's own duty) in maintenance of order, which continue to influence functioning of legal system in India, and which have rendered *dharma* as a pluralistic concept. There is also a need to make efforts to understand in what sense the traditional values differ from the values promoted by human rights discourses, and what can be the means to protect rights of women or to ensure women's empowerment without having to challenge traditional values. In concrete terms what is needed are the efforts to go beyond the series of binary oppositions such as family versus individual, duty versus right, sacrament versus contract, religious versus secular which have been deployed since colonial era to establish that protection of women's dignity and women's rights is something alien to non-western traditions like India. Resistance to rights in non-western societies is more a result of projecting women's rights and the state as a means to establish family and marriage as oppressive institutions which ensures sexual, moral and economic suppression of women.

What is needed are the efforts to understand that legislative and judicial developments in India relating to institutions of marriage and family, to a large extent, have been about finding a balance between upholding sanctity of institutions of marriage and family while protecting rights of women. It shows that what needs to be highlighted is that in large number of cases emphasis on sanctity of institutions of marriage and family has been means to grant rights to women instead of denying the same. Need of the day is socio-legal discourses which pay attention to the real issues like role of the state in regulating family matters keeping in view specific socio-economic conditions in India. What is needed are the efforts to understand the protection or the rights available to women in traditional institutions of family and

marriage and to what extent it may be possible to supplement these rights with a new set of rights. The endeavor has to be to understand how to balance sanctity of these institutions with new demands for women's rights with changing social and economic circumstances.

1.5 Methodology

Relationship between culture and rights or between law and cultural diversity is an issue which has consumed humungous amounts of scholarly energies in last two centuries. While importance of culture or religion for any individual and society is a well known fact since advent of colonial era, protection of cultural diversity has been a matter of concern only for anthropologists. Increasing interests of rights scholars and lawyers in protection of cultural diversity is a recent development. For scholars across various disciplines including legal scholars, non-western traditions are no longer seen as elements to be neutralised through instrument of law. Neither is colonial rule to be seen as a beneficial legacy. The task for scholars instead is to extricate non-western traditions from colonial era presumptions and to ensure that law can be sensitive to difference between individuals. While above shift, mainly concern for multiculturalism, has been highly pronounced in western democracies, a section of scholarly writings in non-western countries have also kept pace with international developments. Rethinking relationship between law and cultural diversity in general and law and feminism in particular has emerged as an important concern for scholars and activists. Concern for culture or traditions is now as much a concern of legal scholars as it was of anthropologists. Maintaining its focus on women's rights scholarship in India, this work draws attention towards above shift in scholarly and activists discourses. As stated above, it aims to understand its impact on the cause of women's rights in India. It aims to explore whether influence of colonial era presumptions to make sense of non-western traditions is actually a thing of past for the current streams of socio-legal scholarship in India.

In order to achieve above objectives this work undertakes critical analysis of selected scholarly writings in India concerned with rights of women which seem to

have moved beyond scholarship in the pre-1990s phase. While legal scholars and activists have endorsed above change, initiation for it has come from works from disciplines other than law, such as historians, political scientists, sociologists. There exists now a rich body of inter-disciplinary literature under the rubric of ‘post-colonial literature, which is useful in deconstructing the idea of colonial rule as a beneficial legacy. This work maintains its focus on some selected works from different disciplines, which have challenged the idea of colonial rule as beneficial legacy having deconstruction of social reform legislations as a main focus. Some of the important works which are under consideration in this study are: Lata Mani, “Contentious Traditions: The Debate on Sati in Colonial India,”; Sudhir Chandra, *Enslaved Daughters: Colonialism, Law & Women’s Rights*; Sangari, Kumkum, and Sudesh Vaid, *Recasting Women: Essays in Indian Colonial History*; Sarkar, Tanika, “Rhetoric against Age of Consent-Resisting Colonial Reason and Death of a Child-Wife.” *Economic and Political Weekly*; Chakravarti, Uma. *Rewriting History: The Life and Times of Pandita Ramabai*; Nivedita Menon, “Uniform Civil Code – the Women’s Movement Perspective.” *Kafila*, October 1, 2014.

Among legal scholars in India pioneers of change have been: Flavia Agnes, Ratna Kapur and Brenda Cossman and more recently Madhu Mehra. Agnes has produced a rich body of literature. Her three prominent works of book-length which are under consideration in this work are: *Law and Gender Inequality: The Politics of Women’s Rights in India*; *Family Law: Family Laws and Constitutional Claims*. Vol. I., *Family Law II: Marriage, Divorce and Matrimonial Litigation*. Vol. II. Apart from Agnes, two other authors whose works distinctly represent a shift in women’s rights scholarship are Ratna Kapur and Brenda Cossman. One of the most influential works of these authors which has been referred to extensively in this work for critical analysis is *Subversive Sites Feminist Engagements with Law in India*. While the three authors above have addressed the issue of rights of women in family in general, an important work which specifically addresses the issue of polygamy and pluralism in intimate relationships is Madhu Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*.

Through critical analysis of above writings, this study explores whether these works actually go beyond the colonial presumptions which were responsible for denigration of non-western traditions.

Chapter Two

Relationship between Law, Social Change and Traditions: Colonial Era Framework

Trained by us to happiness and independence, and endowed with our learning and political institutions, India will remain the proudest monument of British benevolence.

- Charles Trevelyan

But there are triumphs which are followed by no reverse. There is an empire exempt from all natural causes of decay. Those triumphs are the pacific triumphs of reason over barbarism; that empire is the imperishable empire of our arts and our morals, our literature and our laws.

*- Macaulay,
Speech of 10th July 1833*

Contemporary social change and rights discourses, in India, as in many other ex-colonial countries, are a colonial legacy. While nobody denies the above fact, during last few decades scholarly discourses on rights of women in ex-colonial countries have come to question and challenge the idea of colonial rule as a beneficial legacy for the non-western societies. In recent times the ‘civilising mission’ story of colonial rulers has come to be seriously challenged and deconstructed enough. It is now more or less common knowledge that ‘civilising mission’ was a justification for colonial, imperial rule. Nobody now contests that this mission was rooted in what some have called as British intellectual game of creating colonies in Asia and Africa in negation to the West.¹¹² The game, rights scholars now acknowledge,¹¹³ was to establish that the West had Reason, discipline, science, capitalism, in short, modernity; and the non-west was home to ignorance, fatalism, low technology, feudalism.

¹¹² For a detailed discussion on this issue see Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992). Also Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*, 1 edition (Oxford: OUP India, 1988).

¹¹³ Menon, *Recovering Subversion*.

However, till recently, for example till 1990s, rights discourses concerned with rights of women in India did not have too many reasons to doubt or question any of the basic presumptions about differences between the West and the East posited by the colonial administrators. Scholars were convinced that their task was to use instrument of the State and its legal system to push Indian society ahead on that path of progress, on which it was set upon by the British rulers.

This chapter draws attention towards colonial era presumptions which explicitly dominated socio-legal discourses in India till 1990s, and in fact, as we shall see in the next chapter, continue to dominate even the recent streams of discourses. It draws attention towards those presumptions about the notion of progress and also about the non-western societies which were central to the framework of social change during colonial rule in India, as much as in other colonies, and which laid the foundation for understanding relationship between law, rights of women and cultural diversity in socio-legal discourses even after independence.

2.1 Colonial Rule, Non-Western Societies and the Notion of Progress

Faith in the potential of human intellect, as it has been rightly argued by many scholars,¹¹⁴ was one of the most important foundation stones of the colonial Empires in India, as elsewhere in the world. This faith rested on the perceptions about the ‘all-human character’ of Europe’s advanced (modern) age. It was based on what was perceived as successful experimentation by the ‘enlightened forces’ in Europe in realising an absolute rupture from the past- that past, which colonial rulers believed, was ridden with superstition, arbitrariness and dominance of religion. European traders and imperial administrators shared a strong conviction that this advanced age of Europe was neither a historic co-incidence or nor result of a mere natural evolutionary process. Instead, it was an outcome of conscious human (European) design which had ‘objective, absolute foundations and universal validity.’¹¹⁵

¹¹⁴ Stokes, *The English Utilitarians and India* ; Bauman, *Legislators and Interpreters*; Fitzpatrick, *The Mythology of Modern Law*.

¹¹⁵ Bauman, *Legislators and Interpreters*. Bauman points out the main characteristics of modernity as:

Europe's progress, it was believed, was result of conscious human design to relegate religion to a private sphere and to set in motion the processes of secularization of society through the instrument of law.

For colonial administrators exposure to different forms of life 'submitted' to nature or to God(s) in different parts of Asia and Africa, was nothing but a grim reminder of Europe's long forgone and dark past. Although 'rest of the world' appeared as a reflection of Europe's remote past, and different life forms therein could be placed on the same scale of evolutionary progress'¹¹⁶ that Europe had tread, the colonial administrators were sure that 'rest of the world' will not be able to usher in the advanced age on its own.¹¹⁷ Colonial authorities were of the view that engulfed by superstition, by beliefs in supernatural powers and perils, non-European cultures lacked the attributes which were considered essential to seek a break from the past and to make transition towards an advanced age- the age of Reason. As Fitzpatrick points out, for colonial rulers 'the savage 'mind' was 'unfurnished' with certain notions essential for society: these 'involve the notions of political society; of supreme government; of positive law; of legal right; of legal duty; of legal injury'.¹¹⁸ In colonial view, non-Europeans were 'typified by 'lacks'- of law, government, husbandry and much else'.¹¹⁹ Yet there was no doubt that these 'lacks' could be

Its conviction of its own superiority over alternative forms of life, seen as historically or logically 'primitive'; and its belief that its pragmatic advantage over pre-modern societies and cultures, far from being a historic coincidence, can be shown to have objective, absolute foundations and universal validity. (At p. 119)

¹¹⁶ For a detailed description of 'evolutionary theory of progress' see Rouland, *Legal Anthropology*. (pp. 19-36)

¹¹⁷ Sir Henry Sumner Maine, *Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas*, 12th ed. (Lonon: John Murray, 1888). Convinced that 'progress' is a characteristic only of English society Maine emphasised,

no one is likely to succeed in the investigation who does not clearly realise that the stationary condition of the human race is the rule, the progressive the exception. (At p.21)

Also see Rouland, *Legal Anthropology*. Rouland endorses this idea as he cites from an eighteenth century author,

In 1760 in *La Langue des calculs*, Condillac summed up the evolutionist thought well, as it was perceived at that time: 'we, who believe ourselves knowledgeable, need go amongst the most ignorant peoples to find out how we began to make progress: from it is our beginnings that we need to discern; we know little about them because so much time has elapsed since we were disciples of nature.' (At p. 27)

¹¹⁸ Fitzpatrick, *The Mythology of Modern Law*, 1992. (At pp. 78-79)

¹¹⁹ *ibid.* (At p. 73)

taken care of and that the ‘enlightened’ few, using the same means as had been used in Europe, the European political and legal institutions, will be able ‘to remake everything- individuals, their needs and desires, their thoughts, their actions and interactions, the laws that set a frame for such interaction, those who set the laws, society itself’.¹²⁰

The colonial rulers worked on the presumption that non-western societies had remained backward due to lack of faith in the potential of human intellect. It was believed that human intellect had been ignored in these societies since demands of religion, caste, family, kin-group or community had priority over interests of individuals. These demands, it was further believed, had forestalled any possibility of emergence of a nation State and an advanced legal order.¹²¹ There was a firm belief that the progress of Europe in comfort and wealth was direct outcome of the liberation of the individual achieved by Reformation through the instrument of secular and rational authority of the State. It appeared certain that Europe’s march on the path of progress could become possible due to the advanced legal order which consisted of following characteristics:

- 1) Individual will as the basis: legal system derived its authority from the popular will which finds expression through a centralised authority and individual was subject only to the laws based on (human) Reason and promulgated by the state.
- 2) Forward looking and progressive: human basis of laws ensured that laws could be changed and modified to suit the changed circumstances.¹²²

¹²⁰ Bauman, *Legislators and Interpreters*. (At p. 101)

¹²¹ Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul Ltd., 1970).

¹²² Maine, *Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas*. Reflecting on changing yet unchanging nature of customs and customary laws Maine mentioned,

It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long- in some instances the immense- interval between their declaration by a patriarchal monarch and their publication in writing. It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change. A new era begins, however, with the Codes. Wherever, after this epoch, we trace the course of legal modification, we are able to attribute it to the conscious desire of improvement, or at all events of compassing objects other than those which were aimed at in the primitive times. (At p. 19)

- 3) Certainty: legal order consisted in a body of uniform, written, coherent and fixed rules which regulated human conduct actually and imperatively in a given locality and period of time, whose origins could be traced to a centralised authority, either in the form of codes, statutes or as recognised written customary rules.
- 4) Impartial and impersonal character: operation of laws did not depend upon the personality of judges, and laws ‘in their operation, were free of influence of or control from government itself’.
- 5) Autonomy: legal order consisted of methods of systematisation, elaboration and maintenance of rules of procedure and evidence, which could delimit the social context for the legal purposes and mark the rules as legal.
- 6) Equality: legal order ensured equal protection of laws and equality before law for every individual. Differences between persons on the basis of religion, sex, race, origin etc. did not have legal relevance. Aimed at serving the principle of equality of human beings and protecting equally the interests of each and every individual through allocation of rights and duties while balancing it with common good the legal order consisted in impartial adversary proceedings where one party wins and other loses.

The common understanding was that an advanced legal order, as an autonomous and self-sustaining system, was the symptom, the cause and the consequence of emergence and perpetuation of a new social order in the Europe.

And, in contrast to the above, non-western societies suffered, the colonial rulers believed, and remained backward, due to a non-western conception of law, for being governed merely by customs, customary laws or the religion based laws.¹²³ It was a conception which was completely devoid of the important values that were

For a detailed description on ideas of Maine about non-western societies also see Rouland, *Legal Anthropology*. (especially pp. 20-23)

¹²³ Fitzpatrick, *The Mythology of Modern Law*. Fitzpatrick draws attention towards colonial rulers’ views on custom as he stated,

[Custom], said Bentham, is ‘for brutes’- written law being the law for civilized nations’. Austin followed suit. For him, law as a positive product of the will contrasted essentially with the rules that rest on ‘brute custom’ rather than on ‘manly reason’ and were thus ‘monstrous or crude productions of childish and imbecile intellect’. (At p.60)

characteristic of advanced legal order- progressiveness, certainty, objectivity, impartiality, autonomy and equality. It was a legal order:¹²⁴

- 1) which had not the individual will, but the 'divine' will or the given laws of nature as the basis, and which required every individual's 'submission', willing (passive) or by force, to the dictates of the religion or to the customs and customary laws
- 2) which, being based on written 'divine' laws or age old customs was tied to the past and lacked mechanisms for modifications in laws
- 3) which could not ensure any certainty in the interaction of individuals (i) as it consisted of confused overlapping categories; uncertain, unclear, unwritten norms of conduct or written but religious, unsystematised and superstitious rules; and (ii) lacked any definite external authority (a specific machinery) to demand obedience and enforce rules or norms of conduct;
- 4) where laws, far from being autonomous, were deeply embedded in social and religious context resulting into imposition of religious or moral norms on people;
- 5) where operation of laws depending on the will and personality of the 'judges' was despotic and arbitrary;
- 6) where, given absence of any concern for equality, the laws were aimed at maintaining and reproducing inequality, hierarchy, different conditions and differences amongst people according to the religion, gender, age, stage or status in the society.

Although non-western societies were found to be very different from the advanced Europe, still the colonial administrators had the confidence that all the deficiencies of non-west could be taken care by introduction of English legal and political institutions. It was considered necessary to seek a break from the past since an

¹²⁴ For Britishers view on conception of law in non-western societies see Rouland, *Legal Anthropology*. (pp. 19-36). Also see Maine, *Ancient Law: Its Connection with Early History of Society and Its Relation to Modern Ideas.*; Malinowski, *Crime and Custom in Savage Society*. Describing colonial rulers' opinion on non-western societies Malinowski noted,

Colonial rulers were of the view that non-Europeans have a thinking which is lawless, unsystematic and rhapsodical. (At p. 9)

Also see Comaroff, "Colonialism, Culture, and the Law."

assumption implicit in colonial approaches was that growth of an individual could not be conceived as long as community or family would be the basic principle of organization in society. There was a broad consensus that social progress was conducive only to a society governed by advanced legal order, with a system of government committed to releasing 'individual energy by protecting its efforts, by freeing it from despotism of custom and communal ownership, and from the tyranny of religion'.¹²⁵ There prevailed a conviction amongst colonial administrators that it was only through free trade under mild, liberal and effective government where an individual's property is held sacred¹²⁶ can any society be set on its path of prosperity and progress.

Colonial rulers were of the view that with the introduction of advanced legal order any society could be reorganised into a progressive society with the following characteristics: (i) where individual is the basic unit; (ii) where every individual is a 'self-sufficient' and 'autonomous' being- a 'sovereign' being free from dependence on the will of others, a being having exclusive control of and rights in his own persons and capacities, for which he owes nothing to the society;¹²⁷ (iii) where

¹²⁵ Stokes, *The English Utilitarians and India*. Discussing social change orientations of British Stokes noted,

Mill was proposing a revolution of Indian society carried solely through weapon of law. The purpose of the revolution was the same as the end of all government; it was to release individual energy by protecting its efforts, freeing it from the despotism of custom and communal ownership, and from tyranny of priest and noble. (At p. 69)

¹²⁶ Fitzpatrick, *The Mythology of Modern Law*. Highlighting preference for individual property Fitzpatrick stated,

With primitive common ownership, declared Grotius, men were content to feed on the spontaneous products of the earth, to dwell in caves'. They did not constructively tame nature. ... The savage was a wanderer or related to land in an indefinite communal way, not sufficiently removed from the common state Nature placed it in. In either capacity, the savage had no sufficiently fixed relation to things to support a legal right to them. Property was the basis of law. (At p. 50)

¹²⁷ C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962). Describing conception of individual in original seventeenth century individualism Macpherson stated,

The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself.... The human essence is freedom from the dependence on the will of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. Society consists of relations of exchange between proprietors. Political society becomes a calculated device for protection of this property and for maintenance of an orderly relation of exchange. (At p. 3)

secular state and its laws assume the obligation to protect every individual's freedom from any relations except those relations which the individual enters voluntarily with a view to his own interest; (iv) where every individual is subject to only two duties, duty to one-self and duty to state and is free from the diverse constraints of religion, caste, community or custom; (v) where state and its laws provided the basic principles of human interaction and every individual's freedom could be limited only by such obligations and rules as are necessary to secure the same freedom for others; (vi) where religion is relegated to the private sphere from where it can exercise no influence on secular and rational public sphere.

2.2 India a Prototype of Non-western Societies

For colonial rulers although a prototype of non-western societies, India was found to have some characteristics distinct from other Asian and African societies.¹²⁸ It was found to be distinct since it was discovered that India consisted of communities like that of Hindus and Muslims who were governed by codified laws, that is, the rules that could be found written in some specified books.¹²⁹ India also appeared distinct because of its plurality- for co-existence of diverse kinds of communities, that is, those governed by different customs and those governed by written religion based laws. Apart from above distinction, Indian society appeared like any other non-western society in Asia and Africa, governed by laws which were meant to impose religious beliefs on individuals, with no possibility for exercise of human agency and for individual growth and development. India, colonial rulers were convinced, lacked inherent capability to become an advanced, progressive society like European society. Colonial rulers attributed this incapability to the presumption that the faith in human intellect was foreign for these communities where religion dominated all spheres of life, public as well private.¹³⁰ Being governed by religion based laws, the possibilities for change in India didn't exist.¹³¹

¹²⁸ Bernard S. Cohn, "Law and the Colonial State in India," in *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca & London: Cornell University Press, 1989), 131–52. (At p. 132)

¹²⁹ For a detailed description see J. Duncan M. Derrett, "Sir Henry Maine and Law in India," in *Essays in Classical and Modern Hindu Law*, by J. Duncan M. Derrett, vol. 2 (Leiden: E.J. Brill, 1977), 260–75.

¹³⁰ Rajeev Dhavan, "Introduction," in *Law and Society in Modern India*, by Marc Galanter (Delhi: Oxford University Press, 1989), xiii–c. Drawing attention towards colonial era presumptions Dhavan notes,

Although Hinduism was observed to be one of the religions in the multi-religious country, colonial rulers were of the view that Hindu religion was the source of all Indian ills as ‘the great moral force in India was the Hindu form of government and law, above all, the Hindu religion’.¹³² It was suggested that despotism, particularly despotism of the priestly class, the *Brahmins*, destroyed the autonomy of the individual will. According to rulers roots of all evils was tyranny of ‘crafty and imperious priesthood’ over the minds of people.¹³³ It was suggested that the most essential thing was to release individual conscience from the tyranny of the priests. It was also suggested that in spite of having advanced over the African societies by having developed written texts, the Hindus, due to dominance of priestly class has not been able to overcome the ‘appalling depths of bestial superstition and social corruption’.¹³⁴ It was believed that tyranny was maintained because of the ignorance of the people and the hold which the vast fabric of superstition exercised over their

Although Maine did not provide a sophisticated understanding of whom Indian law serviced and why, there is no doubt that Indian scholarship remained trapped in Maine’s metaphors for a long time. His characterizations of Indian law were not only the basis of nineteenth and twentieth century law reform but also remain a vehicle for socio-legal analysis to this day. *Maine’s intuition rather than empirical evidence structured future law reform and scholarship.(emphasis added)* (At p. xvi)

¹³¹ Cohn, “Law and the Colonial State in India.” Drawing attention towards presumptions of colonial administrators about Hindus Cohn stated,

It appears that Jones believed that even though manners, habits, dispositions, and prejudices were not fixed or immutable, the Hindus of India had usages that were fixed from time immemorial. Unlike the British with their case law, in which a lawyer could trace changes both in manners and in customs as well as in the law, the Hindus therefore lived a timeless existence, which in turn meant that differences in interpretations offered by Pundits must have arisen from ignorance and venality. (At p. 147)

¹³² Stokes, *The English Utilitarians and India*. As Stokes aptly describes the view prevalent among colonial rulers as he stated opinion of colonial rulers,

The great moral force in India was the Hindu form of government and law, above all, the Hindu religion. Their common character was their despotic nature; and here was the source of Indian ills. Despotism destroyed the autonomy of the individual soul and so extinguished the source of virtue, since the man ‘who is dependent on the will of another.... thinks and acts as a degraded being and fear necessarily becomes his grand principle of action. (At p. 31-32)

¹³³ *ibid.*

¹³⁴ *ibid.* Stokes quotes Charles Grant, to demonstrate the mind-set the prevailed among colonial administrators,

Upon the whole then, we cannot avoid recognizing in the people of Hindostan, a race of men lamentably degenerate and base; retaining but a feeble sense of moral obligation; yet obstinate in their disregard of what they know to be right, governed by malevolent and licentious passions, strongly exemplifying the effects produced on society by a great and general corruption of manners, and sunk in their misery by their vices, in a country peculiarly calculated by its natural advantages, to promote the prosperity of its inhabitants. (At p. 31)

lives. It was believed that these above-mentioned characteristics had persisted in India as religion based legal order did not offer any possibility for change. It was also concluded that these religion based laws ordained that the society consisted of four hierarchical classes or castes (varnas), which in descending order, were the priest (*Brahman*), warrior (*kshatriya*), peasant (*vaishya*), and serf (*shudra*). Highlighting that law was deeply embedded in social and religious context, it was pointed out that it was these texts which provided that family and not the individual was to be the basic unit in the society. It was believed that due to influence of *dharmasastras* caste remained the basic principle of organization of society restricting the allegiance of individual only to the caste or the group concerned without any concern for political or territorial administration, thereby precluding the possibility of emergence of State.

Considering Indian society, particularly Hindus to be in stranglehold of this priesthood, colonial rulers were convinced that progress of Indian society lay in liberation of individuals from the clutches of Brahmins and their *dharmashastras*. It was considered necessary to seek a break from the past since an assumption implicit in colonial approaches was that growth of an individual could not be conceived as long as *dharma*- which in colonial view meant- law found written in the religious text books- would be the basic principle of organization in society. There was a broad consensus that social progress was conducive only to a society governed by 'rule of law', with a system of government committed to releasing 'individual energy by protecting its efforts, by freeing it from despotism of custom and communal ownership, and from the tyranny of religion'.¹³⁵ There prevailed a conviction that it was only through free trade under mild, liberal and effective government where an individual's property is held sacred can India be set on its path of prosperity and can finally share community of interest with British. Stokes captures the above presumption as he notes,¹³⁶

Cornwallis believed that everything hinged upon the recognition of proprietary rights of the *Zemindars*, the great landholders; and indeed landed

¹³⁵ Stokes, *The English Utilitarians and India*. (At p. 69)

¹³⁶ *ibid.* At p. 5

property is the kernel of the Whig conception of political society. To the Whig mind landed property appeared as the agency which affected the reconciliation of freedom with order. Itself almost a part of the law of nature, there flowed from a system of landed property a natural ordering of the society into ranks and classes, 'nowhere more necessary than in this country', maintained Cornwallis, for preserving order in civil society.

Deriving from their experience in Europe colonial rulers were of the view that this break from the past, this fundamental transformation of Indian society could be achieved through introduction of English law and English political and legal institutions. It was unquestionable that once India was given English political and legal institutions along with security of the individual property, progress of India society, meaning thereby, erosion of indigenous world view and re-organisation of society having individual at its centre will only be a matter of time. For rupture from the pre-colonial past of India appeared certain with the introduction of new order of things, which should have for its foundation, the security of the individual property, and the administration of justice, criminal and civil, by rules which were to disregard all conditions of persons.

2.3 Religious Tolerance: A Mainstay of Colonial Policies

While there was not much doubt that fundamental transformation of India could be realised through European political and legal institutions, it is true that colonial administrators did take different positions with respect to the desirability and the necessity of establishing English political and legal institutions and of realising 'anglicisation',¹³⁷ of India.¹³⁸ Some amongst the colonial administrators favoured that British should be able to perform their 'duty' in India leaving, as far as possible, indigenous institutions and practices undisturbed. Another section of colonial administrators, on the other hand, was in favour of strong state and strict codified laws which can regulate all aspects of individual and social interaction. However, with strong influence of liberal thinking in colonial administration, the dominant view was not in favour of imposing 'new order of things' on indigenous population.

¹³⁷ Stokes, *The English Utilitarians and India*. (At p. 2)

¹³⁸ For a detailed discussion on this point *ibid.* At pp. 1-24

The dominant view, instead, was in favour of religious tolerance and non-interference in the affairs of the 'native population'.¹³⁹ Therefore, while utilitarian preference for strong and rational legal codes, enjoyed wide support amongst colonial administrators,¹⁴⁰ this preference was duly conditioned by the awareness of the limits of state law in general and under the circumstances of colonial rule in particular. Banerjee points out, 'although Macaulay 'revered' Bentham as 'the father of jurisprudence' and advocated legal reform with a view to making the law more effective and rational, he did not seek to use law as an instrument for the transformation of society'.¹⁴¹ There was awareness that the task of creating new social order in India called for efforts beyond introduction of European political and legal institutions. Colonial authorities were aware that the change in attitudes, beliefs and opinions- essential pre-requisites for establishment of new social and legal order- called for supplementing legal measures with non-coercive social and educational efforts. Given strong influence of liberal thinking on colonial administration, it was also considered important that the measures for social change were grounded in the will of natives. The colonial liberal view considered it necessary that natives were made to realise for themselves degenerate nature of their society. It was considered necessary that the demand for change must come from within the community. It was important to the British that the natives awakened to the necessity of seeking 'assimilation' with the British civilisation as their sole

¹³⁹ Alan Gledhill, *The Republic of India: The Development of Its Laws and Constitution*, 2nd ed. (London: Steven and Sons Ltd., 1964). (At p. 5)

¹⁴⁰ See Stokes, *The English Utilitarians and India*. Chalking out comparison between rational utilitarians and Evangelists Stokes pointed out,

Although there was, of course, a profound gulf between their actual practising ideas, the assumptions of Evangelical theology and the Utilitarian philosophy were remarkably similar. For both, man was a creature of sensation, of pleasure and pain. His failure to attend his happiness was the result of ignorance and miscalculation. Because of this he tended to prefer present pleasure to a more remote lasting happiness. Knowledge would show men their true state and enable them calculate aright. But until men were fully educated, and until they had sufficiently disciplined themselves to forgo the immediate pleasure for the sake of lasting happiness (the Evangelicals would say until men were 'born anew'), a 'severe schoolmaster' was necessary in the form of law. For the Evangelicals this meant the Divine or Mosaic Law, whose first use was to punish ignorance and 'slay the sinner'. For the Utilitarians it meant that the human legislator must assist men to avoid harmful acts by artificially weighting such acts with the pains of punishment. (At p. 54-55)

¹⁴¹ Sir Gooroodass Banerjee, *The Hindu Law of Marriage and Stridhana* (Delhi: Mittal Publications, 1984). (At p.169) Also Rudolph and Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context."

chance of regeneration, and they themselves make a demand to the colonial government for improving natives' condition. It was believed that an adequate combination of strict laws and appropriate system of education could go a long way in inculcating the desire in the native population to reach the stage of advancement which British were presumed to have reached.

With respect to situation of women, secularisation of laws and substantive reforms in customary and religion based laws appeared to be of utmost necessity. However, given compulsions of colonial rule and colonial rulers' reluctance in interfering personal/family matters, British rulers saw their role limited to providing state judicial forums and to rendering the laws uniform, written, certain and systematised.¹⁴² The 'policy of non-interference' was a result of the above reluctance, with little realisation that the process of rendering law certain and predictable would cause serious distortions in Indian society.

2.4 Policy of Non-Interference: Means for Exercising Tolerance

British, it is a well-known fact, came to India as traders and continued as rulers.¹⁴³ It was decided already in the early years of the Empire not to interfere in personal and religious matters of indigenous population. Best attempts were made to refrain from dealing with personal (familial) or religious disputes of members of native population. Derrett pointed out,

By 1769 the British had no intention of accepting more knowledge or interest in Hindu or Muslim customs or laws than was essential for performing the functions which had devolved on them. The natives were to govern themselves, provided that the government should retain all the advantages of any authority or jurisdiction which the Company had inherited.¹⁴⁴

¹⁴² Cohn, "Law and the Colonial State in India." Highlighting concern for natives' religion and culture in colonial administrators Cohn stated, "Jones wanted to restore to India its laws, which pre-dated Islamic invasions." (At p. 147)

¹⁴³ For a detailed discussion on this point see Anil Chandra Banerjee, *English Law in India* (New Delhi: Abhinav Publications, 1984). Also, J. Duncan M. Derrett, *Religion, Law and the State in India* (London: Faber & Faber, 1968).

¹⁴⁴ J. Duncan M. Derrett, *Religion, Law and the State in India* (London: Faber & Faber, 1968). (At p. 284)

For a similar view also see Stokes, *The English Utilitarians and India*. Highlighting concern for religion and traditions amongst British, Stokes noted,

In later years when confronted with the necessity to settle disputes related to personal (family) matters of indigenous population, policy of non-interference in personal and religious matters of natives was devised as a way towards respecting religious beliefs of the natives. All British wanted to do was to provide official forums that could efficiently administer indigenous religious laws for indigenous population.¹⁴⁵ A clear expression of this policy was: the famous regulation of 1772 by the then Governor of Bengal, Warren Hastings to the effect, “in all suits regarding inheritance, marriage, caste and other religious usages and its institutions, the laws of the Koran with respect to the Mahomedans, and those of *Shasters* with respect to the Gentoos, shall be invariably adhered to”.¹⁴⁶ While making such a Declaration, British saw their role limited to providing state judicial forums and to rendering the laws uniform, written, certain and systematised.¹⁴⁷ However, in the context of colonial rule, loaded with pre-conceived notions about non-western societies, it was difficult for Britishers to appreciate that the policy of non-interference and the efforts for mere systematisation of laws- were actually tools for interference in Indian society.

Even after 1772 when it had stood forth ‘in the character of Dewan’, the Company under Hasting’s guidance had been anxious to keep as far as possible to the traditional Indian methods and forms of government. ‘We have endeavoured’ wrote Hastings of his administrative reforms, ‘to adapt our Regulations to the Manners and Understanding of people, and Exigencies of the Country, adhering, as closely as we are able, to their Ancient Usages Institutions. (At p. 35-36)

¹⁴⁵ Stokes, *The English Utilitarians and India*. Expressing skepticism towards British concern for efficient administration of justice Stokes stated,

Efficient administration of justice meant English law, particularly a modern law establishing private property rights in land, and a system of courts which ensure that the influence of the law should be felt in the remotest hamlet. It meant using law in a revolutionary way, consciously employing it as a weapon to transform Indian society by breaking up the customary, communal tenures. (At p. 42)

¹⁴⁶ Derrett, *Religion, Law and the State in India*. Drawing attention towards familiarity of British with the Personal law systems Derrett stated,

The European rulers were prepared to believe in personal laws based upon religion because they knew that such a system operated in the Ottoman Empire and they viewed the Mughals as a variety of ‘Moors’ or Muhammadan sovereigns with whom the Christian world had many and various dealings. It is just possible that some jurists of the period remembered the personal laws of the Middle Ages in Continental Europe, whereby citizens of various towns and provinces of the Empire were entitled to have their laws administered to them wherever they were. Yet in such suppositions European visitors to India were merely rationalizing a situation they saw for themselves but imperfectly understood. (At p. 53)

Also see Menski, *Comparative Law in a Global Context*. (At pp. 239-242)

¹⁴⁷ Cohn, “Law and the Colonial State in India.” Highlighting concern for natives’ religion and culture in colonial administrators Cohn stated, “Jones wanted to restore to India its laws, which pre-dated Islamic invasions.” (At p. 147)

For the colonial administrators, it was difficult to understand that the notions of the law, religion and progress nurtured by them were culture-specific notions¹⁴⁸ and that a policy incorporating above notions would, instead of being a means to respect and tolerate religions and cultures of India, be a tool for exercise of cultural imperialism and ethnocentrism.¹⁴⁹ In context of colonial rule not much attention could be paid to the fact that the Declaration of 1772 was actually a means to offer a foreign framework for making sense of non-western traditions. It could not be seen that declaration was a means to introduce a scale to evaluate different societies, something which privileged written rules, attributable to a definitive source in Heaven, as progressive and advanced over unwritten/oral customs and traditions practiced by people as primitive and backward.¹⁵⁰

This declaration induced the process, from whereon all the efforts for understanding Indian traditions, religions and laws resulted into making it fit into a ‘universal model’ of progress. It initiated a definitive process, through which diverse patterns of growth over thousands of years relating to regulation of family matters were to be interpreted along a linear pattern of development- from customs to religious laws.

¹⁴⁸ Menski, *Comparative Law in a Global Context*. Ludo Rocher, “Hindu Conceptions of Law,” *Hastings Law Journal* 29, no. 6 (1978): 1283–1305. Highlighting that the concept of law imported by British was a western concept Rocher writes

It was not until 1772, the year in which it was decided that, “in all suits regarding inheritance, marriage, caste and other religious usages or institutions,” the Hindus should be governed by their own laws, that an effort was made to study and translate the Sanskrit books in which the Hindu laws were codified. These books happen to be the *dharmasastras*, treatises on *dharma*. Hence, the equation established by the Western editors and translators of these books was *dharmasastra* equals lawbook, code or Institute. They also established the equation: *dharma* equals law. (At p. 1283)

On culture specific nature of law introduced by British also see Surya Prakash Sinha, “Non-Universality of Law,” *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 81, no. 2 (1995): 185–214.

Also Bernard S. Jackson, “From Dharma to Law,” *American Journal of Comparative Law* 23 (1975): 490–512. Highlighting misunderstandings perpetuated by the British rulers Jackson points out,

An extreme case of erroneous identification with a modern model was committed by the British judiciary in India. Confronted by immense variety of Indian local custom they seized upon the famous *dharmasastras* (such as the “Code” of Manu), which had developed a recognizably juridical style, and transformed them into statutes. (At p. 492)

¹⁴⁹ Menski, *Comparative Law in a Global Context*. (At p. 241)

¹⁵⁰ For a detailed discussion on this aspect see Rouland, *Legal Anthropology*. (At pp. 19-36)

Indeed, this could be made possible through combination of factors originating in local circumstances and colonial design.

2.5 Policy of Non-Interference: Cause for Misconceptions

As stated above, the Declaration of 1772, albeit inadvertently, introduced far-reaching changes in the Indian society concerning regulation of family matters. Menski aptly described the implications of the 1772 regulation for Indian society and British rule as he noted,¹⁵¹

This important Regulation had several effects. First of all, it indicates British recognition of Hindu law, assuming that these laws were found, more or less codified, in the *sastras*. Secondly, this Regulation effectively confirmed that the British would not introduce English law in all respects and subjects. By preserving the so called ‘listed subjects’ to which succession was added in 1781, as the domain of personal laws, notice was given that Hindu law was to be applied to Hindus even before much was known about their law. Thirdly, the Regulation gave notice that the British intended to exercise more direct control over public law, with criminal law as a priority.

The Declaration was an announcement to the effect that the British considered Hindus and Muslims were relatively progressive as compared to other communities as both these communities appeared to be governed by laws which could be found written/codified in some specific sacred books.¹⁵² The Declaration was also an evidence of the British understanding that Hindus and Muslims could be divided into two distinct, homogenous communities divided on the lines of religion.¹⁵³ For

¹⁵¹ Menski, *Comparative Law in a Global Context*. (At p. 241)

¹⁵² *ibid.* At p. 240

¹⁵³ Elizabeth Kolsky, “Maneuvering Personal Law System in India,” *Law and History Review* 28 (2010): 973–79. Highlighting diversity in India Kolsky notes,

Hasting’s plan was based on the assumption that Hindus and Muslims were distinct communities with separate and uniform bodies of law. This assumption was inconsistent with the diverse identities and syncretic religious practices existing among people on the subcontinent. (At p. 976)

Also see Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India,” in *Institutions and Ideologies: SOAS South Asia Reader* (Richmond, UK: Curzon Press, 1993), 165–85. Anderson mentions

The Hastings plan rested on the notion that indigenous norms could be plugged into British-based legal institutions without significantly compromising the integrity of either. Coming to

example, as Derrett eloquently explained that for British it was difficult to comprehend at the onset of colonial rule that despite being two distinct religious communities, ‘broad characteristics of Hinduism belonged to the entire population’.¹⁵⁴ It was also an announcement to the effect that the life spheres would be divided into two distinct spheres- the public sphere which will be governed by the British rulers, which will be purged of the influence of religion and cultures and the private sphere where religion and cultures can have a role to play and which would be free from interference by the state or the colonial rulers.¹⁵⁵

In the context of colonial rule it was difficult to foresee that above understandings were potent tools of interference in Hindu society; that rather neutral and benign objective of systematisation of law was something laden with bias and prejudices which could cause serious distortions.¹⁵⁶ That this process of systematisation would

understand that the shari’a was authoritative for Islamic legal scholars, many British administrators glossed over its internal contradictions and finely distinguished levels of moral approbation, and set about applying it as a set of more or less homogenous legal rules. (At p. 172)

¹⁵⁴ Derrett, *Religion, Law and the State in India*. Explaining peculiarity of traditions in India Derrett points out,

Some characteristics of India require to be painted in the broad, because the majority of Indian Muslims and Christians was derived as communities from the Hindu population itself to which their ancestors belonged before they were converted. Broad characteristics of Hinduism belong to entire population still. (At p. 56)

¹⁵⁵ Declaration was also an indication of the fact that British felt the necessity to consult ‘local experts’ only in few areas, which came to be termed as ‘listed subjects’. It was an indication of the British presumption that these were the only areas which were important to determine religion based or cultural identity and would be governed by the cultural norms. On this see *ibid*. Addressing the issue of ‘listed subjects’ Derrett mentions

‘Inheritance, marriage, caste, and other religious usages or institutions’ were to be administered to Hindus according to the law of ‘Shaster’. Why these topics and not others? Two forces were evidently at work, the influence of local jurists on the Company’s representatives, and the predispositions or prejudices of the latter. As far as former are concerned, Hastings had obviously been advised that in all questions of caste-breaking, religious institutions, and those topics of the *sastra* which were founded upon ‘unseen motives’ the laws of the Hindus must be ascertained from the sacred sastric texts and the learnings enshrined therein. It would be essential to consult pundits to discover what the appropriate rule was. Hastings and his colleagues were, of course, predisposed to see the division of topics of law in terms of contemporary English division. All matters of marriage and divorce, and all questions of testaments and distribution of goods, all matters of religious worship and discipline, excommunication and so forth were within the exclusive jurisdiction of the Bishops’ courts, and the law was ecclesiastical law. So the pandits’ distinction between ‘unseen’ and ‘seen’ will have coincided with the Englishman’s notions of scopes, respectively, of the ‘courts christian’ and ‘courts temporal’. (At p. 233)

¹⁵⁶ *ibid*. Derrett noted,

create unique challenges, was something difficult to comprehend and appreciate.

Derrett succinctly described challenge for Indian legal system as he wrote,¹⁵⁷

In unconscious conflict between *dharma* (righteousness) and mere law India has struggled, struggles now dramatically, and will struggle, and not least by way of matrimonial causes. The difference between a *dharma* problem and law problem is simply this, that in former cases all considerations, including the effect of various solutions upon the surrounding social circumstances, are taken into account at the point of decision, while a law-problem is solved by reference to predetermined rules worked out without reference to any particular persons, places or times, sometimes laid down by people quite unconnected with the parties and even residing in different countries and in different periods, and invariably obtained out of books and other printed paper! To jurists in ancient times, and still in various parts of India, the latter method of solving disputes seems gross and very amateurish. To the cosmopolitan scholar, of course, the former method is simply corrupt. There can be no reconciliation between the two, unless India will happen to be the first country to work it out.

It could not be seen that for Hindus the systematised body of law would only operate as one of the layers of law with customs and traditions going underground.¹⁵⁸ In the

As it was, the British administrators insisted upon clarity, certainty and finality in terms foreign to Hindu tradition, and if the pandit was true to his *sastra* he could not at the same time substitute the new attempts at legislation for his own old authorities. Perhaps the attempts were doomed to failure. (At p. 269)

Also see Anderson, "Islamic Law and the Colonial Encounter in British India."

¹⁵⁷ J. Duncan M. Derrett, *The Death of a Marriage Law: Epitaph for Rishis* (Durham, North Carolina: Carolina Academic Press, 1978). (At pp. 49-50)

¹⁵⁸ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2010). Pointing out limitations of the westernised state law for large number of rural population in India Glenn noted,

The local traditions say different things, and they are profound things relating to life and death and personal responsibility, which have been passed on for millennia. There is no widespread, positive phenomena of obedience to law which is simply enacted or judicially stated. Already, within a half-century of the Hindu Code's creation, it is being pointed out that older notions of legality still persist- caste autonomy, accepted forms of deviance, evasion or ignorance of law. The traditional society also uses the formal law for its own ends. So we may see the Hindu Code, like Maimonides code, pulled back to the people, surrounded by commentary, subject to on-going, revelatory development of tradition. If the law is king, hindu law has long taught that it is the people who decide which law. (At p. 276)

context of colonial rule it was difficult to notice that the process of systematisation of Hindu and Muslim laws could be done only by obscuring some vital elements of these worldviews. In the context of colonial rule it was necessary to ignore or perhaps difficult to appreciate that colonial rulers' presumptions about Hindu and Muslim communities, about notion of law prevalent in these communities was a result of some gross misconceptions about these communities and understanding of law prevalent therein. In search of closest equivalent to the western notion of law amongst Hindus, it was necessary to ignore that equating *dharma* to law or to 'Hindu law' - to a set of norms received from a definitive source in Heaven would be against the spirit of Hindu traditions.¹⁵⁹ In the context of colonial rule it was also difficult to appreciate that while there existed rich literature for Hindus which could be seen as religion based scriptures and which provided extensive guidance to individuals on all possible aspects of life, reducing these scriptures to law books will entail gross misunderstanding about the concept of law in the Hindu society.¹⁶⁰

For a detailed description, see Derrett, *Religion, Law and the State in India*. Derrett provides a comprehensive description of how British were convinced that the efforts for systematisation of Hindu Law was an activity in the interests of the Hindus. Drawing attention towards colonial administrators' efforts to systematize and codify Hindu law and the challenges it created for the Indian legal system Derrett noted,

In May 1773 eleven Pandits, including some persons of known eminence in their profession, commenced their labours at Calcutta, finishing a digest to Hasting's specifications in February 1775. The work was called *Vivadarnava-setu*, or 'bridge across the ocean of litigation', and it acquired soon afterwards the alternative title *Vivadarnava-bhanjana*, 'breakwater to the ocean of litigation', implying thereby that the certainty now for the first time offered to litigants in the Company's territories would put some check upon the appalling flood of cases which inundated courts. (At p. 239)

He further noted how British efforts to offer certainty to natives through codification of law, 'failed to deflect pundits from their normal sources of information, and merely added another to their many reference works'. (At p. 240)

¹⁵⁹ Derrett, *Religion, Law and the State in India*. Derrett stated,

No translation of any *smriti*, even that of Manu, could enable the courts to administer to the Hindus the 'law of Shaster' or their 'law and usages'. In the same way no single text could do duty for an able pandit's learning if honestly applied. (At p. 250)

For similar views on importance of texts as sources of Hindu law also see Jackson, "From Dharma to Law."; Donald R. Davis, "Law and 'Law Books' in the Hindu Tradition," *German Law Journal* 9, no. 3 (2008): 309–26. Considering British rulers' attempts to equate *dharma* with law, Davis notes,

A failure to recognize the nature of the sacred texts on religion and law in the Hindu tradition, particularly the nature of *Dharmasastra* both as text and tradition, led to numerous misconceptions and misappropriations of the classical Hindu law tradition during and after the British colonial period in India. (At p. 317)

¹⁶⁰ S.G. Vesey Fitzgerald, "Place of Hindu Law in Comparative Jurisprudence," *Law Quarterly Review* 39 (1923): 357–71.; David A. Funk, "Traditional Orthodox Hindu Jurisprudence:

Concerns for efficient administration of justice and the accompanying belief that uniformization and systematization would result into efficient administration of the colonised territories made it necessary for colonial rulers to ignore true nature of *dharma* as a multi-vocal concept, as an inherently plural entity which defied all attempts at translation¹⁶¹ and which meant different things at the same time. It was necessary to ignore that

Dharma is multi-vocal: besides element, data, quality and origination, it means law, norm of conduct, character of things, right, truth, ritual, morality, justice, righteousness, religion, destiny, and many other things. It would not lead us anywhere to try to find an English common denominator for all these names, but perhaps etymology can, show us the root metaphor underlying the many meanings of the world.¹⁶²

Requirement of clear and certain rules to govern the natives through a formal judicial system made it necessary that colonial rulers ignored the concept of cosmic order, which was central to Hindu traditions and which rendered *dharma* as an inherently plural concept.

2.5.1 The Concepts of Cosmic Order and Dharma: Sources of Cultural and Legal Pluralism in India

The concept of cosmic order entails the understanding that the universe exists in form of a pre-existent macrocosmic order, as a kind of ecologically sound symbiotic

Justifying Dharma and Danda,” *Southern University Law Review* 15 (1988): 169–213. For a detailed discussion on challenges in using *shastras* as law books see Derrett, *Religion, Law and the State in India*. (especially see chapter three, “Religious Commands and Legal Commands” pp. 75-96). Drawing attention towards distortions to Hindu or even Muslims’ understanding of law Derrett stated,

The need for certainty took precedence over the comfort of the science of jurisprudence. The *dharmasastra* as a living and responsible science in matters which might come before a court of law died when the courts assumed judicial knowledge of the system in 1864, but the death-sickness commenced with Jones’s quaint act of 1786. (At p. 250)

¹⁶¹ Rocher, “Hindu Conceptions of Law.” (At p. 1284), also Ved P. Nanda, “Hinduism and Human Rights,” in *Hindu Law and Legal Theory*, ed. Ved P. Nanda and Surya Prakash Sinha, International Library of Essays in Law and Legal Theory (England: Dartmouth, 1996), 237–47.

¹⁶² Sinha, “Human Rights.” (At p. 87-88) Also see Nanda, “Hinduism and Human Rights.”

order in which every component part has a place and an important role to play.¹⁶³ While it is indubitable that order exists, the question as to who is in charge of this order has been left open. It is commonly accepted that the higher order does not depend on one divine figure but on an unknown force.¹⁶⁴ While there is no agreement as to who or what is in charge of this order, there is no doubt that the higher order exists and that both Gods and men must submit to it alike. The Hindu worldview encourages every individual to understand that participation in this ordered universe is not subject to individual choice, and that Gods, humans, animals and all other beings have their place in this order due to some invisible ordering force to which everyone, by necessity, must relate. This ancient conceptualisation of pre-existent order consists in imparting less importance to individual as an ordering force than to elements beyond human or even divine control. The concept of cosmic order puts forward an image of inescapable interrelatedness between micro-cosmic and macro-cosmic and visible and invisible spheres. Envisaging inescapable interrelatedness, human beings and ordered universe, life, within Hindu system, is seen as a complex experience, in which everybody and everything is visibly and invisibly interconnected in a giant systemic network of cosmic dimensions. It is predominantly perceived to be an internally regulated, self-controlled order with in-built mechanisms to correct its disturbances that it is subjected to for various reasons. Expectations about conscious efforts for maintenance of self-controlled Order in the Hindu system are accompanied with the realisation that Order will always be subject to disorder. As Menski points out,¹⁶⁵

The internalised dialectics of cosmic order as a never-ending process rather than an idyllic final state mean that the ideal of balance will at all times

¹⁶³ For a detailed discussion on the concept of cosmic order see Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: Oxford University Press, 2003). Menski, *Comparative Law in a Global Context*.

¹⁶⁴ For a detailed discussion on Hinduism not being a “revealed religion” see Menski, *Hindu Law*. Menski states,

Hinduism does not require its adherents to accept the supremacy of a particular God and to submit to His Order. The higher Order does not depend on one divine figure but on an unknown force. Therefore, Hindu is not defined by allegiance to a particular God or gods, but to the conceptual system as a whole and, later to a way of life relating to such concepts. Having assumed that no one particular named superior God can solely be in charge of this Order, Hindus, it appear had agreed to disagree over the identity of ‘the Absolute’. (At p. 147)

¹⁶⁵ Menski. (At p. 160)

necessarily be accompanied by imbalance, thus requiring constant vigilance and re-balancing.

Belief in the presence of self-healing mechanisms of internally regulated self-controlled Order excludes the necessity of imposing norms of appropriate conduct by any external authority or institution for maintenance of this order.

2.5.1.1. The Concept of *Dharma*

Dharma, which comes from the Sanskrit root *dhr*, signifies an obligation, a duty for all, Gods, humans and others to try their best to partake in the higher order, contributing as much as possible in its sustainability.¹⁶⁶ This is deemed important because of the understanding that the order or the balance in the Cosmos is maintained as long as every constituent element makes its proper contribution, that is, performs one's own duty, the *svadharma*.¹⁶⁷ This worldview also incorporates the understanding that the roles are specific to different people and situations, and they depend on factors like gender, age, stage or status in society. It also encourages every individual to understand that although maintenance of order requires conscious efforts on part of every individual, the universe is a self-controlled order, and that it consists of in-built visible and invisible mechanisms for its maintenance that involves Gods, humans, animals and all other beings. Therefore, the worldview encourages every individual to understand that deviations from *svadharma* bring consequences not only in this life but also in subsequent lives.¹⁶⁸

Drawing upon this image, *dharma* signifies an obligation binding upon every individual, which is to be his or her *svadharma*, to choose a way of life that embodies awareness of the overriding demands and expectations of an ordered (symbiotic) universe. The expectation is that each individual engages in any action or inaction with the awareness that he or she is integrally connected to family, clan, community, state, nation, and ultimately the universe and that each action as well

¹⁶⁶ For a detailed discussion on the concept of *dharma* also see K. L. Bhatia, *Concept of Dharma: Corpus Juris of Law and Morality: A Comparative Study of Legal Cosmology* (New Delhi: Deep & Deep Publications, 2010).

¹⁶⁷ P. V. Kane, *History of Dharmashastras*, vol. I (Poona: Bhandarkar Oriental Research Institute, 1968). (At p. 1)

¹⁶⁸ Sri Aurobindo, *The Foundations of Indian Culture*, 3rd ed. (Pondicherry: Sri Aurobindo Ashram Press, 1971).

inaction has potentially wide reaching visible (*drista*) and invisible (*adrasta*) consequences for all the other elements in the web.¹⁶⁹ Dharma, in other words, implies an obligation upon every individual to take appropriate action, to do the right thing at the right moment, for serving the inescapable interrelatedness, after understanding and accepting, through a process of critical reflection, her position and her role in the complex cosmic web.

2.5.1.2. Dharma as an Inherently Plural Entity

In Hindu worldview, while there is an expectation concerning appropriate actions from each element, a distinctive feature has been the fact that there is no fixed notion of what is appropriate. Appropriateness is an essentially relative criterion. Therefore conceptually *dharma*, is universalistic in extreme, which means that there does not exist an absolute, measurable notion of ‘good’, while *adharma* (opposite of *dharma*) cannot be interpreted as an equivalent of ‘bad’. Human life is perceived as a constant, complex and dialectic process of ascertaining what is appropriate or right. Therefore, notions of *dharma* and *adharma* depend on particular situations, signifying doing the right thing at the right moment.¹⁷⁰ A general understanding that no two situations can be identical influences decisions about appropriateness. This belief underscores the basic requirement that each individual situation is to be dealt with separately against the whole contextual background.

¹⁶⁹ J. Duncan M. Derrett, *Introduction to Modern Hindu Law* (Bombay: Oxford University Press, 1963). Emphasising the value of interconnectedness in Hindu traditions, Derrett stated

The ancient Hindus saw the ‘after-life’, or ‘-lives’, as of one piece with this life, the transient with substantial, and the individual did not exist apart from the needs, prejudices, and claims of his family, claim, occupational class, and ethnic group. Claims conflicted, duties cut across each other, and out of these conflicts juridical thought emerged. (At p. 3)

¹⁷⁰ *ibid.* Drawing attention towards plurality inherent in *dharma* Derrett noted,

The view that everything could be right, and yet that some ways were more right than others, led to the proliferation of compositions on the subject of righteousness; and the comparison, explanation, and digesting of such texts, which were at first oral, became a science. (At p. 3)

Also Ram Mohan Das, *Women in Manu and His Seven Commentators* (Bodh-Gaya: Kanchan Publications, 1962). Das notes,

To speak of *Dharma* itself becoming *Adharma* and vice versa according to the change of times and localities is really to speak a good deal more than just allowing the mere possibility of modification in *Dharma*. It is to ask men to be prepared for such complete and radical changes in *Dharma* as may be even contradictory to the generally accepted *Dharma*, in order to suit the exigencies of time and other conditions. (At p. 32)

Since the higher order does not depend on one divine figure but on an unknown force Hinduism has never required its adherents to accept the supremacy of a particular God or to submit to His order. Therefore *dharma* does not represent a creed or religion, requiring allegiance to a particular God or Gods. *Dharma*, instead, relates to the conceptual system as a whole and later to a way of life relating to such concepts, which regulates an individual's or group's activities as members of society as well as independent autonomous units with the aim of maintaining cosmic harmony.¹⁷¹ As long as this code of conduct is aimed at serving harmony in the micro-cosmic and macro-cosmic spheres, different groups or the individuals can claim allegiance to Hinduism.

A fundamental aspect associated with this core conceptual structure is that these notions about the existence of Higher Order and every element's place in it are not to be imposed on anybody. A core concept, called *atmanastushti* (one's own satisfaction) warrants that one of the basic requirements for serving this order would be the satisfaction of every individual's conscience. Consequently, *dharma* does not possess element of force or constraining power with an external authority as an integral element. Lingat explains this point well as he notes,

Dharma has no constraining power by itself. It puts itself forward, it shows the way which one should follow, but it does not impose that way.¹⁷²

Therefore the basic purpose of the Hindu system, as Menski emphatically points out, remains to offer guidelines for every human being in order to regulate his or her activities as an individual and as a member of society in accordance with *dharma*, to discover himself or herself amidst never-ending chain of role conflicts and to find his or her own path in life.¹⁷³ Nobody, no matter how well-versed about the intricacies of the workings of cosmic order and place of human being in this cosmic order, is supposed to take more steps than that are required to provide guidance about this order. *Svadharmas* of those well-versed in such intricacies is to show the way or to provide guidance about every individual's or his immediate social group's

¹⁷¹ Menski, *Hindu Law*. (especially chapter three, at PP. 86-107)

¹⁷² Robert Lingat, *The Classical Law of India*, trans. J. Duncan M. Derrett (USA: University of California Press, 1973). (At P. 258)

¹⁷³ Menski, *Hindu Law*. (especially chapter three, At pp. 86-107)

obligations in particular situation and context and leave on him or them the choice to proceed on the recommended path.

The Hindu worldview envisaged social order as being one with natural order, a self-controlled order which could be maintained and perpetuated by internal self-control or performance of *svadharma* on part of each individual. However, given the realisation ‘that the ideal of balance will at all times necessarily be accompanied by imbalance,’¹⁷⁴ it is accepted that activities in conformity with *svadharma* will always be accompanied with deviations from it. Yet, deviating behaviour of individuals and acceptance of deviations did not effect the belief that every individual carries the potential to reflect, understand, and accept one’s position in the cosmic web and to perform her obligations accordingly. At the same time there is also an acceptance that this potential cannot be realised by an individual in one lifetime, but through constant guidance every individual will reach the stage, even if in subsequent lives, where he/she will be able to realise this potential. Various factors relating to varying combinations of basic inclinations (*gunas*) in every individual, human instincts and diverse worldly circumstances are believed to create obstacles in this realisation. These obstacles can be dealt with and their effect minimised through constant guidance about one’s *dharma* to serve the interconnectedness in the micro-cosmic and macro-cosmic spheres. As a means of guidance for each individual, Hindu system classifies every human being’s pursuits of life into four broad categories, the pursuit of moral order, (*dharma*); seeking material security/wealth, (*artha*); seeking fulfilment of desires for pleasures, (*kama*); and seeking freedom, (*moksa*). The predominant purpose of this classification is to take into consideration and thereby attempt to regulate the effect of human instincts on society. Through this division the system aimed at providing guidance so that every individual could pursue his worldly desires, the *artha* and *kama* considerations, in accordance with *dharma*, that is, with sense of duty towards cosmic harmony.

These fundamental aspects of Hinduism- the importance of the satisfaction of individual conscience, emphasis on the potentiality of every individual to achieve

¹⁷⁴ *ibid.* At p. 108

the ideal of internal self-control, and perception of cosmic order as a constant process of dialectics between balance and imbalance- render acceptance of diversity as its internal criterion. These aspects ensure that the body of *Sanskritic* literature- *Vedas*, *Upnishads*, *dharamsutras*, *puranas*, *dharamshastras*- which gives expression to and provides guidance about intricacies of the working of the cosmic Order and ideal expectations from different individuals and groups to serve this order is not the most important source for determining situation specific *dharma*.¹⁷⁵ The sources that could be relied on for determination of *dharma* were: *Atmanastushti*, (satisfaction of individual conscience), that is, individual satisfaction about ‘doing the right thing in the right way at the right time’, collectively and individually experienced”; ‘*sadacara*’ (model behaviour), that is, customs of good people, where good people could be one’s peer group, respected people from one’s immediate environment, or learned men relying on scriptural authority; *Smriti* texts (post-Vedic Sanskrit literature) and the *Vedas*.¹⁷⁶

Having emphasis on satisfaction of individual conscience as an important source of *dharma* practices, usages and customs of the different communities could vary from being in slight deviation to being in opposition to the *Sanskritic* norms as an internal criteria of the Hindu system. Consequently, conformity with the *Sanskritic* norms is not a determining factor for *dharmic* or *adharmaic* character of different practices, usages or customs or any particular solution to a conflicting situation. Their *dharmic* character depends on their ‘appropriateness’ in the situational context.¹⁷⁷

¹⁷⁵ See Derrett, *Religion, Law and the State in India*. Pointing out the fact that *dharmashastras* were not the only source for decisions relating to *dharma* or ‘righteousness’ Derrett stated, Custom existed for support, rather than the confinement, of inclinations. It was great part of *dharma*. ‘righteousness,’ and the rulers that upheld it were themselves upheld. (At p. 187)

¹⁷⁶ Menski, *Hindu Law*. (Chapter three, At pp. 112-130)

¹⁷⁷ On this point see Derrett, *Religion, Law and the State in India*. Addressing the issue of sources of law or of *dharma* Derrett noted,

In any litigation, the pleas must rely upon a source of law, but the practical needs of the context will exclude principles of written law which were stated in general terms and which must, according to general precept, be administered in conformity with *nyaya* or *yukti*, natural reason or equity. (At p. 155)

Highlighting complexity of the issue of relationship between *sastras* (written texts) and custom Derrett stated that for any one engaged in the task of determining *dharma*, it entailed dealing with arguments in circle. The issue, according to Derrett, was

Therefore while there were written texts laying down abstract rules and norms to govern behaviour of individuals, for a *dharmic* order the concern was not merely application of these abstract rules and norms to specific situations. In dealing with any particular situation the aim was to maximise social harmony or to abate group conflict or tension. It was reconciliation of parties through compromise and conciliation that characterised result of the litigation. *Vyavahara* roughly translated as litigation implied removal of doubts or ascertainment of *dharma* in a conflicting situation.¹⁷⁸ As Derrett points out,

The native system had always admired abstract justice from afar, but it applied only on levels where more pressing considerations were absent.¹⁷⁹

Native tribunals valued impartiality and had to distinguish between authentic and adulterated testimony.¹⁸⁰ But the judgement concerning credibility of evidence arises from the intimate and direct knowledge the adjudicators have of dispute between them rather than through an elaborate system of rules of evidence, procedure and pleading. Priority for maximisation of social/group harmony leaves other principles like ensuring formal equality for every human being, protection of individualistic rights of every human being in a secondary position. *Dharmic* order also aspired to use each conflicting situation as an occasion to direct the society, as far as

The *sastra* refers in proper circumstances to customs for the solution of disputes, and yet must the customs not be inconsistent with the *sastra*? The meaning was that the custom should not of its very nature be hostile to the fundamental tenets of the Hindu socio-religious system as expounded in the *sastra*. (At p. 157-158)

Derrett further clarified the issue as he stated,

One who accepted the *sastra*, either as a hereditary possession, or as a novel import, accepted with it the facility to enforce customs, and also the duty to guide them and to apply them in a manner consistent with the basic principles of *sastra*. The authority for using the *sastra* as a residual system lay, therefore, in the Hinduism or Hinduizing tendencies of the ruler, and ultimately of the ruled. (At p. 163)

Derrett further mentioned,

In derogation from the *sastra* a valid custom was binding by sastric authority; but the source of the *sastra*'s authority was the public's acceptance of the postulates of Hinduism, and the source of custom's factual content and applicability was public desire not to move from the ways of ancestors. Yet in practice custom was not static, neither was the umbrella provided by the *sastra* inelastic. (At p. 164)

¹⁷⁸ Menski, *Hindu Law*. (At pp. 112-120)

¹⁷⁹ Derrett, *Religion, Law and the State in India*. (At p. 285)

¹⁸⁰ Menski, *Hindu Law*. (At pp. 112-120)

practicable, towards understanding and acceptance of the requirements of the cosmic Order. *Dharma* as an organisational principle served two-fold aims: first, to act as a guiding force for the society to direct it to the idealist positions as a means to serve the cosmic harmony; and second, to provide solutions to the conflict situations with an aim to ensure that every individual performs obligations and also receives his or her entitlements.

2.5.1.3. Dharma: Neither Law nor Religion

Perceptions of interconnected between micro cosmic and macro cosmic spheres also impart a specific and distinctive character to *dharma* as organisational principle of existence along with imparting a distinctive understanding to law in Hindu conceptual structure. Stressing on this distinctive understanding of law that underlies *dharma*, Menski mentions,¹⁸¹

In an integrated society, where spheres of law, morality and religion largely overlap, one may perceive dharma and its implications as religious, but it operates together with other forces and is neither simply law, nor just religion.

Beliefs about interconnectedness preclude division of life spheres into autonomous distinct domains, the public sphere and the private sphere, thereby rendering meaningless for the *dharmic* system differentiation between legal rules and religious rules. The understanding about interconnectedness between different spheres necessitates that every legal norm is at the same time a religious norm for it inevitably will carry an effect on invisible sphere. Derrett emphasised the above point eloquently as he cited an important ancient jurist *Medathiti*,

the function of judge which is never entirely immune from the taint of sin (for no judgement can be prefect), must be approached as if it were the performance of a religious obligation.¹⁸²

¹⁸¹ *ibid.* At p. 98

¹⁸² J. Duncan M. Derrett, "The Concept of Law According to Medathiti, a Pre-Islamic Indian Jurist," in *Essays in Classical and Modern Hindu Law*, by J. Duncan M. Derrett (Leiden: E.J. Brill, 1976), 174–96. (At p. 184)

For a legal system based on *dharma*, the main concern is not the distinction of life spheres into religious and secular. Instead as Derrett explained eloquently,¹⁸³

The fruitful distinction is between the commands that were merely binding in conscience, and that which was, apart from the conscientious sanction, capable of being enforced by the king or his officer in the course of judicial proceedings.

The overlapping of religious and legal does not preclude distinction between various kinds of injunctions that may be required for operation of *dharma* in society. Various distinctions like, enforceable injunctions, unenforceable injunctions, ‘injunctions unenforceable by nature’, injunctions which are capable of enforcement by a caste tribunal, could be discerned from the *sastras*. Similarly while concern for both, visible as well as invisible spheres, played an important role in arriving at decisions in accordance with *dharma*, extent of concern for either of them depended on the situational context, therefore, varying from one situation to the other. Derrett has shown, with the example of one of the great jurists of the *dharmic* order,¹⁸⁴

To him the transcendental and the practical are equally real. Those who do not accept the transcendental must accept the practical, or they will suffer in this world. Though it is the task of *dharamsastra* to teach both, since the problems of avoiding re-birth were seen to be as real as those of avoiding imprisonment, the teacher is aware of the greater urgency of the latter to most people.

Emphasis on situation dependent concern for visible and invisible sphere ensured that concern for invisible sphere did not overshadow practical and immediate concerns. It was concern for these practical issues that led various *smritikaras*¹⁸⁵ to device ways to obviate the effects of written texts when they could not respond to the demands of the situation. *Medathithi* made a distinction between *drastartha* (related to seen world) and *adrastartha* (related to unseen world) texts, but contended that the *smriti* texts are to be considered as *drastartha* to facilitate

¹⁸³ Derrett, *Religion, Law and the State in India*. (At p. 77)

¹⁸⁴ Derrett, “The Concept of Law According to Medathiti, a Pre-Islamic Indian Jurist.” (At p. 180)

¹⁸⁵ Literally meaning authors of treatises on various facets of *dharma*

deviation from them to suit the demands of the situation. It was every individual situation that guided which rules, religious, customary or textual were to be applied and which aspect, related to the visible world or to the invisible world, is to be given prominence. Derrett writes,¹⁸⁶

Interpretation of law was never complete unless the surrounding circumstances of the alleged offender had been taken into account”. “There is entire chapter of *sastra* (scriptural text) devoted to ‘*apat*’, time of distress. This can also be called law of exceptional circumstances. The theory was that restrictions on powers and the seriousness of social misconduct and crimes were automatically modified in a time of distress, such as invasion by the enemy, drought, famine, plague and the like. In such circumstances marriages otherwise improper could be entered into, improper adoptions could be performed, and most, striking of all, the normal precaution against crime and sin might be relaxed. Moreover, as see from Manu XI, 16-18, which enable a Brahman to steal from a person of lower caste enough to stay his hunger if he has not eaten for three days, even a personal distress, not really qualifying for the relaxations appropriate to *apad*, which should be general misfortune, may serve to vary the normal rigour of the law.

¹⁸⁶ Derrett, *Religion, Law and the State in India*. (At p. 95) Also see Das, *Women in Manu and His Seven Commentators*. Explaining the concept of *dharma* according to a famous *smritikar* Manu, Das states,

The recognition of *desa* and *kala* as potent factors affecting *dharma* itself is a tacit acceptance by Manu of the fact that despite attempts at formulating rules for regulating man’s conduct of life and behaviour through *Dharma*, they are not to be taken as rigid and static principles, but have been allowed a certain amount of flexibility and modifiability in their operation to suit varying conditions. (At p. 32)

2.5.2 Family: A Resort in Spiritual Journey of Life

*Asrama-vyasvasta*¹⁸⁷ - the scheme that provides guidelines for organisation of life of an individual- also gives guidance about the importance of the institution of family for the social Order and cosmic harmony. According to this scheme each individual's life should be divided into four *ashramas* or stages of growth: *brahmacharya* (student-hood), *grhastha* (married life), *vanaprastha* (quiet life of contemplation and withdrawal from activities) and *sannyasa* (renunciation). This is perceived as a division required to facilitate the spiritual journey of life and to enable every individual in realising four goals of life, *artha* (material pleasures), *kama* (sensual desires), *dharma* (performance of duty), and *moksha* (renunciation). Each stage of growth represents a stage of maturation. The society, including its legal system, has to guide the inner process of maturation by providing spiritual disciplines, appropriate to each stage of growth.

The first stage - the stage of student-hood - is the period to prepare an individual for participation in social life, so that he or she fits into society, grow as an individual and contribute to social growth. It is through the second stage- the stage of married life- that an individual starts to participate actively in social life. By taking a suitable partner in life an individual enters the married stage of life, in which couple participate together, deciding to contribute. This stage is considered most important of all the four stages of growth, as it is during this stage and through the institution of family that individuals can provide support for people in the other three stages. Therefore, maintenance and continuation of the family as an institution is an obligation of every member of the family as one's contribution towards society. Ramajois points out verses from Manusmriti that emphasise the importance of Grihasthaashrama:¹⁸⁸

A householder who follows the path of Dharma and discharges his obligation as a householder is superior to all persons in other Ashramas because he is the supporter of all those in other Ashramas. (VI- 89)

¹⁸⁷ This can be roughly translated as an arrangement of different stages of life.

¹⁸⁸ M. Rama Jois, *Ancient Indian Law: Ancient Values in Manusmriti*, 1st ed. (Delhi: Universal Law Publishing Co., 2002). (At p. 46)

Just as the rivers, big or small, find place of rest in the ocean, even so men belonging to all Ashramas find protection in the householder. (VI-90)

They contribute to the family, to the neighbourhood, to the community, to the earth they live on and to the cosmos in both micro cosmic and macro-cosmic dimensions.

Every human marriage, which provides basis for the family, is perceived as an action of cosmic relevance.¹⁸⁹ Menski points out,¹⁹⁰

It has the impact of conceptually equating husband and wife as cosmic forces (.....). Their permanent timeless unity, their visible and invisible linkages, and the atmosphere of symbiotic mutual support all serve as blue prints for an everlasting human marriage.

This cosmic union between two individuals is also an occasion for manifesting links between larger groups of people which can be extended families (kinship groups or clans), caste groups, villages to enhance mutual co-operation and contribution to cosmic harmony. Menski further notes,¹⁹¹

Vedic expectation is that a human marriage will be conducted in accordance with *rta* (macrocosmic ‘Order’), as a human activity for the purpose of strengthening cosmic harmony and the entire ‘system’, however perceived.

Entering in to the stage of married life is a kind of religious or moral obligation for both man and woman. Since purpose of the family is to contribute in cosmic harmony (‘divine’ purpose), family is perceived as a religious institution, sanctified by religious ceremony and meant for a religious or spiritual life. In this view creation and maintenance of a partnership between two individuals for each other’s satisfaction is not the sole purpose of marriage.¹⁹² This partnership is also created for

¹⁸⁹ Werner Menski, “Marital Expectations as Dramatized in Hindu Marriage Rituals,” in *Roles and Rituals for Hindu Women*, ed. Julia Leslie (London: Pinter, 1991), 47–67.

¹⁹⁰ *ibid.* At p. 52

¹⁹¹ *ibid.* At p. 53

¹⁹² *ibid.* Describing nature of Hindu marriage Menski noted,

Hindu marriage rituals are concerned with all different components of this cosmic whole and not merely the two individuals at centre. (At p. 53)

the performance of the other familial and societal obligations within the cosmic web. Importance for partnership arises from the fact that marriage (*vivah*) gives a man the eligibility to perform certain Vedic rituals stressing on the importance of ritual partner in individual's life. Rama jois points out,¹⁹³

Devaruna (pious obligation to the Gods) was required to be discharged through religious sacrifices and other virtuous deeds such as making gifts to deserving people and various kinds of service to the needy and helpless and suffering people as a householder. It was ordained that all such acts must be performed by the husband and the wife jointly: *To be mothers were women created and to be fathers men. Religious rites therefore are ordained in the Veda to be performed by the husband together with his wife.* (IX-96).

Through marriage a man and a woman creates a new nuclear family within the husband's joint family or clan. Therefore, marriage, as a way of marking cosmic links, is a means through which a family or a group contributes in the perpetuation of another group. Thus, marriage implying passage of bride from and by her natal family to the marital family is itself a spiritual act where one family or group offers procreative power of a woman to another family for its continuation. This act of passage of woman from one family to the other lays down obligation on both sides that are involved in it. It is *dharma* of both marital and natal family to take all the steps necessary to facilitate incorporation of bride into marital family.¹⁹⁴ Ritual process or ceremony is an important part of formation of marriage relationship, as rituals are perceived to prepare man and woman for entering into a different stage of life. Once the basic rituals for incorporation have taken place, care and well-being of the bride is an unavoidable responsibility of the marital family. Having entered into new family for the purpose of contributing in its perpetuation, maintenance and prosperity, bride's *dharma* is to take all possible measures to realise this purpose.

2.5.3 Marriage: A Pluralistic Institution and A Timeless, Eternal Yet a Dissoluble Union

According to the Hindu worldview, marriage, ideally, is a monogamous union and solemnisation of this union as a *samskara* (sacrament), through appropriate ritual

¹⁹³ Jois, *Ancient Indian Law: Ancient Values in Manusmriti*. (At p. 39)

¹⁹⁴ *ibid.* (At p. 40)

observance, is the ideal union between a man and a woman.¹⁹⁵ Marriage as a *samskara* (sacrament) can be defined as a union or a solemn contract between a man, having qualifications for accepting a girl in marriage and a woman, having qualifications for being given in marriage, with their approval and also with the approval of the concerned families or groups, at an auspicious moment and through appropriate ritual ceremony before witnesses from social microcosmic sphere. The married life is expected to provide opportunities for fulfilment of worldly desires while being conscious of the demands of maintaining harmony in microcosmic spheres. The main purpose of marriage as a sacrament is procreation and also to provide stable foundational bricks to the general social structure.¹⁹⁶

Sanskritic texts provide guidance about the ideal or preferred ways for effecting a cosmic union between man and woman and also offer guidance about ideal qualifications of and expectations from partners in the marriage who can best serve this religious/spiritual institution. While sanskritic texts offer necessary guidance about appropriate rituals and all, given the importance of individual conscience and customs of different communities in Hindu system *dharmic* validity of marriage is not a function of conformity with the idealistic (or sanskritic) norms. Ways for formation of marriage relationships and qualifications and expectations from partners have varied from community to community. Deviations from texts were not the reasons for rendering a union between man and woman as invalid. Sanskritic texts too give adequate recognition to this plurality as they incorporate eight forms of marriage. The kind of marriage signified in what way the marriage was contracted:

Brahma-vivaha (marriage based on voluntary giving away of the girl decked with ornaments by father to an honourable and learned groom), *Prajapatya vivah* (marriage based on giving away of the girl by the father to a suitable groom who

¹⁹⁵ Bhagwat Saran Upadhyaya, *Women in Rgveda* (Delhi: S. Chand, 1974).; Also see Paras Diwan, *Law of Marriage and Divorce*, 6th ed. (Delhi: Universal Law Publishing Co., 2011). (At p. 14)

¹⁹⁶ K.P. Jayaswal, *Hindu Polity: A Constitutional History of India in Hindu Times* (Bangalore: Bangalore Publishing Co., 1943). Jayaswal notes,

Marriage according to the Dharma School, is a duty, and, as already pointed out, a sacrament. Without son the Sraddha could not be offered to manes, and, to have sons, marriage was necessary. (At p. 225)

asks for the hand of the girl so that they should perform their duties together), *Daiva-vivah* (marriage based on giving away of the girl by father to an officiating priest at a sacrificial ceremony), *Arsa-vivah* (marriage based on the approval of the father and giving away of the maiden after receiving from a suitable groom a consideration or a conditional security), *Asura-vivah* (marriage based on the purchase of the girl by the suitor to the father of the girl), *Gandharva-vivah* (marriage based on the union between a man and woman in absence of consent of the respective families), *Raksasa-vivah* (marriage based on the capture of girl from her natal place by force), and *Paisaca-vivah* (marriage based on deception, or based on seduction of girl during her insensibility).¹⁹⁷

Though one can find differences among texts about hierarchical ordering of different forms but a general pattern in the texts is categorisation of first four (*Brahma-vivaha*, *Prajapatya vivah*, *Daiva-vivah*, *Arsa-vivah*,) as approved ones and higher in scale as compared to the last four (*Asura-vivah*, *Gandharva-vivah*, *Raksasa-vivah*, and *Paisaca-vivah*) considered as blame-worthy ones. There also appears to be an agreement amongst diverse texts that *Brahma* and *Prajapatya* forms are most appropriate for 'twice-born' castes (*dvijas* or higher castes), that is, people belonging to those castes who have been initiated to the knowledge of Vedas, yet *Arthasastra* text of Kautilya reveal increasing incidence of *Arsa* forms amongst such caste groups. Similarly for *Kshatriyas* (ruling castes), though belonging to 'twice-born' castes exception appears to be in place and *Gandharva* and *raksasa vivah* were also considered approved forms.

Sanskritic authorities' treatment of different kinds of marriage and their concern for attaching consequences to them very well reflects the fundamental concerns of *dharmic* system- to draw a balance between serving the particularistic and practical demands of the community and the individuals concerned and providing guidance

¹⁹⁷ Diwan, *Law of Marriage and Divorce*. (At pp. 49-50). Ludwig Sternbach, *Juridical Studies in Ancient Indian Law* (Delhi: Motilal Banarasi Dass, 1965). According to Sternbach there were not eight but eleven forms of marriage that existed in ancient India. He opined,

When, however, these forms of marriage are closely examined the conclusion can be reached from the legal point of view there existed in ancient India not eight but eleven forms of marriage." (At p. 347)

about *svadharma* of each individual and the community concerned in accordance with the demands of the cosmic Order. Therefore, even while blameworthy kinds of unions were not deprived of *dharmic* validity,¹⁹⁸ the system realised its concern for providing guidance about *svadharma* by attaching different psychic, social and economic consequences to marriages dependent on the nature of the union that was at the base. As another author pointed out,¹⁹⁹

The quality of the off-spring depended on the quality of the marriage rite”
i.e. from the praiseworthy marriages virtuous children were born, and from blameworthy marriages bad children. These virtuous children were radiant with knowledge of the Vedas and were honoured by Sistas.

Under Hindu system various forms of marriage, which could be given recognition by the community concerned have enjoyed the *dharmic* validity. Based on *dharmic* system’s concern on satisfaction of individual conscience, decisions about *dharmic* validity depended on the values which were accepted by individual and his collective group. Decisions such as whether forms unapproved by texts such as ‘marriage by capture’ or ‘marriage by purchase’ should be considered valid or not rested on the community concerned. Communities were also free to take decisions or to seek support of the ruler or any higher authority in order to discontinue certain practices related to union between a man and a woman. Similarly, while higher caste groups are expected to adopt any of the first four forms for marriage solemnisation, still any incident of union which could fall under last four forms did not automatically imply *dharmic* invalidity of marriage. Nature of consequences that could be attached to any particular incident of union between man and woman depended on the whole situational context surrounding any incident and also on those concerned with particular issue.

¹⁹⁸ *ibid.* Sternbach points out,

In any case it appears... that the division of the forms of marriage into 8 or 11 forms had no special meaning from the legal point of view and all the forms of marriage could be divided into righteous forms i.e. orthodox forms of marriage (*Brahma, Daiva, Arsa, Prajapatya* with the exception of only case Mn. 9.196-7 also *Gandharva*) and the blameworthy forms of marriage i.e. the non-orthodox forms of marriage (*Gandharva, Asura, Rakshasa, Paisacha*). (At p. 347)

Also see John Duncan Martin Derrett, *Hindu Law, Past and Present: Being an Account of the Controversy Which Preceded the Enactment of the Hindu Code, the Text of the Code as Enacted, and Some Comments Thereon* (Calcutta: A. Mukherjee, 1957).

¹⁹⁹ Chandra Chakraberty, *A Study in Hindu Social Polity* (Delhi: Mittal, 1987). (At p. 260)

With final decision-making authority residing with different communities concerned for recognising any particular union, Hindu marriage consisted of immense variety of customary forms of marriage solemnisation and of locally and socially determined and observed customs or rituals which could be employed for bringing into effect union between man and woman.²⁰⁰ These rituals or ceremonies varied according to factors like family's/group's purpose of according recognition to the union, nature of the union. It also mattered whether the bride is presumed to be virgin or not, and whether a spouse is widowed or not. Menski writes,²⁰¹

The traditional Hindu law on marriage solemnisation is entirely informal, and yet has a plethora of formal elements in the shape of ritual steps which lead towards a full-fledged, fully recognised and legally valid Hindu marriage. The whole thing is an extended, often a very complex process, and it can last days- but it may in certain circumstances be extremely short and may not involve any visible ritual at all. There may even be what I have called a 'Zero-ritual', especially when the bride was married before and is a widow.

Marriage as a cosmic union creates a bond between two suitable partners that is to be considered sacred, manifesting micro-cosmic and macro-cosmic links. This bond is primarily perceived to be indissoluble and not only for this life but for eternity. Bride having been incorporated in the husband's larger family establishes multiple links with different family members. Both husband and wife are expected to possess enough qualities and capabilities to make this union realise its purpose- serving the interconnectedness. *Svadharm*a of all the other members of the extended family or kin group is to ensure that each nuclear family within the joint family can survive as independent unit while being connected to the larger family group. Personal satisfaction of two individuals or two partners in the marriage not being the sole purpose of this bond, partners in the marriage are expected to conduct their lives with consciousness about the higher concerns of harmony within immediate social

²⁰⁰ Werner Menski, "Legal Pluralism in Hindu Marriage," in *Hinduism in Great Britain: The Perpetuation of Religion in an Alien Cultural Milieu* (London: Tavistock, 1987), 180–200. (At p. 186)

²⁰¹ *ibid.* (At p. 183)

sphere. Absence of harmony between two partners of marriage could be a reason of dissolution when it gives rise to possibility of negative effects on larger familial or social environment. Therefore, divorce or dissolution of marriage bond, though a possibility in principle, is something not recommended or is strongly discouraged. Rama jois highlights the phrases from Manusmriti that emphasise on the duty of both husband and wife to maintain the permanence of the bond,²⁰²

Mutual friendship and fidelity is the highest *dharma* to be observed by husband and wife, throughout their life. (IX-101), Let man and woman, united in a marriage, constantly exert themselves that they may not be disunited and may not violate their mutual fidelity. (IX-102), A man who always remains united with his wife and children, is the ideal person. Husband is declared to be one with his wife. Neither by sale nor by repudiation is a wife released from her husband. (IX-45-46)

Based on the perceptions of marriage as a cosmic union, requirements of harmony are expected to prevail over factors causing disharmony. But, the inevitability of disorder ordains that eternal union yields to temporal requirements, where *dharma* calls for dissolution of even a cosmic union initially perceived to be for eternity. Yet, there is a concern for not letting *artha* (material pleasures) and *kama* (sensual desires) considerations easily sub-ordinate *dharma* considerations and destroy *dharmaic* institution of marriage. There is also concern for not letting remedy of dissolution of marriage become a tool for escaping responsibility on part of either partner. Remedy of dissolving this union is to be perceived as an extreme one, a tool to be deployed when a union meant for performance of *svadharma* creates serious hindrances in its performance.

Sastric texts leads to an inference that in the approved forms of marriage where adequate care has been taken by families, in matters such as suitability of the partners, performance of adequate rituals, the need for dissolution of marriage should not arise. Therefore many *sastric* authorities appear to be prohibiting divorce in four approved forms of marriage or for the people belonging to the groups

²⁰² Jois, *Ancient Indian Law: Ancient Values in Manusmriti*. (At p.40)

initiated in the knowledge of Vedas ('twice-born' caste groups).²⁰³ However, for marriages amongst other groups or communities much more leniency for dissolution of marriage was accepted. Remedy of dissolution could be availed whenever any of the 'well-ordained purposes' of effecting union between man and woman-performance of religious/spiritual and social obligations- remains unachievable. Since the system offered a man the possibility of effecting union with more than one woman in case any of such purpose remains unfulfilled, remedy of dissolution, in effect, seemed to have been available only for women.²⁰⁴ Various texts present evidence about possibility for a woman to abandon a husband on grounds such as bad character, his departure to a foreign land followed by long absence, seditious activities, has become dangerous to her life, has become an out-caste or even an impotent.²⁰⁵

However, while *sanskritic* texts contained idealistic norms about marriage as an eternal union, there were also detailed norms about how and for what reasons a union between man and woman may be dissolved. The decisions concerning when, through what methods a marriage union may be dissolved, in other words decisions about *dharmic* validity of the dissolution of marriage, has been dependent on the community recognition.

Decisions concerning- purposes of a union between man and woman, situations where continuation of union will be a threat to harmony in micro-cosmic sphere, circumstances where a woman should be allowed to abandon her husband, economic responsibilities of husband or wife in case of dissolution based on dislike, other incidental consequences like remarriage, maintenance of divorced wife and children- have also been based on community recognition. It was the whole situational context which determined whether a marriage should be dissolved or not, whether it should result in mere separation between spouses or complete dissolution with the possibility for remarriage to the divorced woman. Therefore, while in *sastric* texts one does not come across specific procedures concerning divorce, Hindu family

²⁰³ Das, *Women in Manu and His Seven Commentators*. (At pp. 120-1)

²⁰⁴ *ibid.* At pp. 198-9

²⁰⁵ *ibid.* At p. 93

dharma consisted of many kinds of customary methods of dissolution of marriages or managing breakdown in the marriage union that were allowed and accepted in different communities.

2.5.4. Economic Entitlements: Means to Serve Inter-connectedness

As discussed above the most favoured form of the organisation of family in the Hindu worldview was patrilineal and patrilocal embodying the institution of joint family although it gradually encompassed within its fold matrilineal and bilateral systems. For the patrilineal systems this institution of joint family was perceived as the best way to serve the cosmic interlinkedness and as a means of ensuring maintenance for a large kin group.²⁰⁶ Joint family was also to a larger extent a characteristic form of property enjoyment, in which *adhikaras* (rights or interests) of a multiple character converge upon each *dhana* (property).²⁰⁷ Distribution of joint family property incorporated the distinctive feature of the Indian concept of property- the capacity of *svatva* (ownership) to exist in favour of several persons simultaneously, not only identical *adhikaras* (rights) being shared, as in the case of co-owners, but especially where the *adhikaras* were inconsistent. In other words as Derrett points out,

The chain from the mula-swami (“root-owner”) to the final, perhaps temporary, possessor must be complete, and each link is of the same qualitative value as the parts of a tree, from root to twig.²⁰⁸

Gender equality or sex equality for the purposes of devolution or division of property certainly was not a matter of concern for the *dharmic* system. Predominant basis for the economic entitlements from the family property in this system was the

²⁰⁶ Derrett, *Religion, Law and the State in India*. Linking institution of joint family to religion Derrett pointed out,

Because religion is a social question as well as, or more significantly than a personal question, an opposite tendency manifests itself. The Indian is pre-eminently a family man. The background of joint-family, which persists to a large extent even amongst some groups of Muslims and Christians, teaches the child to play a multitude of roles and to learn the parts he must play as son, nephew, grandchild, brother and so on. The roles are stereotyped and are played irrespective of personal inclinations. (At p. 60)

²⁰⁷ J.Duncan M. Derrett, “The Development of the Concept of Property in India c. A.D. 800-1800,” in *Essays in the Classical and Modern Hindu Law*, ed. J. Duncan M. Derrett, vol. II (Leiden: E.J. Brill, 1977). (At p. 57)

²⁰⁸ *ibid.* (At p.95)

role that one was accorded to play in the cosmic web on the basis of gender or status in the society. Therefore basis for economic entitlements is the nature and extent of obligations an individual is expected to fulfil. It was widely believed that *svatva* (ownership) couldn't be severed from its purposes and functions.²⁰⁹

The contention was that property existed entirely to perform *sastric* purposes, including for example the maintenance of the householder's family, and the performance of other duties which were "equal to" or were in fact sacrifices.²¹⁰ Derrett points out,²¹¹

The head of the family might exercise discretion and bind others for religious purposes. The king held his property in order to perform his multifarious duties. Neglect of duties endangered, according to this school (*sastric*) of thought, the *adhikara* (right) itself.

One of the important bases of the property entitlements in this patrilineal system was the belief that only the male descendants were capable of offering spiritual benefit to the father.²¹² In this model of family organisation men had to bear primary responsibility to deal with financial matters, to be breadwinners, to take care of the maintenance of the kin or clan members, and to perform spiritual obligations for serving the invisible links with the ancestors. Therefore, though system of property ownership by women was an integral part of this ancient system, on the basis of greater spiritual obligations male members were preferential heirs for allocation of 'absolute' shares in the joint-family property.

²⁰⁹ *ibid.* At p. 101

²¹⁰ *ibid.* At p. 49

²¹¹ *ibid.* At p.50

²¹² *ibid.* Derrett has pointed out an important underlying aspect of this principle. He points out, Their (females) unfitness for some sacrifices was certain. (.....) Because of their lack of fitness to partake in sacrificial ritual upon an equal basis with men, because they lacked the *indriya* or vital potency which was thought to be necessary to be dealing with Indra and other *devas*, it was asserted in a late Vedic text that they were *adayadas*, i.e. non-sharers. This was interpreted to mean that they could neither inherit nor take property at a partition of the family's wealth. Later commentators reasonable pointed out that they lacked potency and therefore lack a share in *Soma*- juice, not property in general. (At p. 30)

Interests in the joint family property were to be divided amongst those having an 'absolute' share in the property (predominantly male heirs); those having limited shares (certain category of female heirs) and those disqualified to have a share (shareless ones, some female relatives, concubines and their issues) but having entitlements to maintenance from the family property.

Specific economic entitlements of women were also meant for the purposes of serving this interlinkedness in the family/community/society. Thus, entitlements of wives were keeping in line with one of the marital expectations, that is, ensuring perpetuation and prosperity of the marital family. Therefore, women were entitled to be the managers of the family property and were also entitled to alienate property in case of necessity or for the spiritual benefit of the husband. They could also inherit property subject to the rule that inherited property should not pass out of the family of a woman's marriage except for her maintenance or necessity, or the husband's spiritual benefit.²¹³ In addition welfare of the marital family being the primary criteria women's entitlements were also subject to their remaining chaste, as their chastity was perceived as a proof of their sincerity towards marital family and their higher capability to subordinate personal desires to higher concerns of family welfare. Daughters, usually not entitled to an absolute share in father's property, could be allocated rights of the son in order to manage father's property and her son enjoyed the authority to offer spiritual benefits to the maternal ancestors and to perpetuate name of that family.

Expectation in the Hindu system is that those endowed with 'absolute' shares will perform their *svadharma* for ensuring well-being of those who have not been allocated such shares in the property. At the same time awareness about the possibilities of deviations from *svadharma* is well reflected in the *shastric* texts with their special emphasis of the entitlements of various categories of dependents on the joint family property. Derrett highlights,²¹⁴

Aged parents, wife and children were the dependants of the first degree in that their rights attached to any property of the son etc. might acquire; others

²¹³ *ibid.* At p. 55

²¹⁴ *ibid.* At p. 67

however were to be maintained out of specific property appropriate to their relationship to its holder. These rights of maintenance were valuable though not transferable, and they served as an encumbrance hindering gratuitous transfers (...). We should it is submitted, not be justified in failing to see in their position a very substantial right to enjoyment of property “belonging” to someone else. To this day in certain circumstances such persons have rights to challenge alienations by the owner of the property form which they must be legally maintained.

Accordingly basic characteristic of joint property was its inalienability. The property could not be easily disposed of by way of sale, gift or will even by those holding ‘absolute’ share. These restrictions ensured that even those male members who were in the category of ‘absolute’ owners enjoyed nothing more than a right to maintenance from the joint family property.

The institution of *stridhana* (literally woman’s property), an institution specific to Hindu system, further reflects its concern for combining allocation of entitlements with their functions and purposes. Sanskrit texts consists of extensive provisions focussing on the exclusive property rights of women, their entitlements as wives, widows, divorcees, unmarried daughters²¹⁵, married daughters meant specifically for their own maintenance. The system concerns itself also with placing specific restrictions on husband and on the marital family against appropriation of *stridhana* along with laying down detailed provisions relating to succession of *stridhana*.²¹⁶ Different *shastric* authorities lay stress on the obligation of the husband or the marital family for providing maintenance to wives, even if separated or abandoned or superseded, even if guilty of adultery or any other kind misconduct, to concubines

²¹⁵ Unmarried daughters had right to claim marriage expenses from the joint property in their natal house. They also had right to residence in the joint family house in case they remained unmarried. There are numerous evidences of diverse customary rights in different regions involving handing over a piece of land to the daughter at the time of her marriage. For a detailed discussion see Das, *Women in Manu and His Seven Commentators*, chapter IV.

²¹⁶ *ibid.* There are references in *smritis* to the effect that neither the husband, nor the son, nor the father, nor the brother have authority over *stridhana* to take it or to give it away. The above point is now recognized even by the contemporary feminist scholars. For example see Agnes, *Law and Gender Inequality*. Agnes points out, This injunction is almost in the nature of a warning to male members to lay their hands off the woman’s property. (At p. 16)

and their children, to women having married in unapproved forms of marriage. Husband had obligation to pay to first wife 'supersession fee' - an equal share of the property, which the husband gifted to the new wife. Increase in extent and scope of *stridhana* with the increasing complexity of the society, as evident in the texts from the medieval period also reinforce concern for ensuring adequate maintenance of women.²¹⁷

Hindu family *dharma*, based on this general understanding of the concept of property and this general perception towards economic entitlements of different members of the family incorporated numerous specific variations in economic entitlements of family members. These entitlements varied for different communities in different regions even within the patrilineal systems, which were more widespread and also for matrilineal or bilateral nature of the family organisation, which have prevailed in southern India and in western India.

While in matters concerning property one can lay claim to greater authority of *sanskritic* texts Hindu system's concern for grounding decisions on appropriateness based on overall situational contexts is well in place. Decisions about what transactions made by a widow or wife while managing the property could be considered in marital family's interest, what should be an unmarried daughters entitlements, in what manner male members could use inherited property, what should be the entitlements of the other dependents from the family property were all subject to demands of specific context and of the situation.

Presence of contradictory norms in the *Shastric* texts for dealing with the distribution of property even within same geographical region present evidence about the emphasis on the importance of taking decisions to suit the demands of the situation. Rocher describes the above point clearly as he notes,²¹⁸

It is noticed that on various occasions, one and the same text exhibits more than one solution for the same legal question. Thus, Manu's chapter on

²¹⁷ A.S. Altekar, *The Position of Women in Hindu Civilization: From Prehistoric Times to the Present Day*, 2nd ed. (Delhi: Motilal Banarsidass, 1959). (At pp. 232-3)

²¹⁸ Rocher, "Hindu Conceptions of Law." (At p. 1296)

inheritance begins with the rule: “After the death of the father and the mother, the brothers being assembled, may divide among themselves in equal shares the paternal (and the maternal) estate...”. The rule, however, immediately following, unmistakably states the principle of primogeniture: “(Or) the eldest alone may take the whole paternal estate, the others shall live under him just as (they lived) under their father.” Another rule speaks of different shares for the sons: “The additional share (deducted) for the eldest shall be one-twentieth (of the estate) and the best of all chattels, for the middlemost half of that, but for the youngest one-fourth”.

2.6 Context of Colonial Rule: Compulsions to Ignore Sources of Pluralism

It was the above-described complex, fluid conceptual structure which admitted extreme socio-legal and religious diversity that colonial rulers were expected to understand and deal with.²¹⁹ There were enough elements in Indian traditions and society to establish that India had similarities with the European society in the ancient and medieval times. Perceptions about the Universe as a pre-existing Order, pre-determined roles for individuals in this order, concerns for maintenance of order, expectations from each individual to submit to the demands of the Order and to contribute in maintenance of this order, idea of marriage as sacrament, importance to the institutions of marriage and family, dominant presence of a class of intellectuals related with religion (addressed as Brahmins, and who could be identified as ‘priests’), a rich body of sacred literature- all these were the elements which could be used by the British to substantiate colonial rulers’ presumptions about pre-modern societies. Moreover, India was certainly not a society which had ‘individualism’ as its core value or which believed in superiority of human beings vis-a-vis other elements in the cosmos. Furthermore, society appeared more concerned about duties or contribution of every individual in maintaining harmony than about rights of individuals.

²¹⁹ Glenn, *Legal Traditions of the World*. Describing Hindu law as fluid and dynamic entity Glenn states,

If other laws are said to take the shape of pyramids, right-side up or inverted, nobody talks about pyramids in Hindu law. It’s more like a dirigible or Montgolfier, you can tie it down, but its real mission in life to float. (At p. 253)

However, despite the above familiar elements there was much in the Hindu worldview that made Indian society very different from what British had imagined it to be. In the early years of the colonial rule it was rather difficult for colonial rulers to accept that Indian society actually didn't fit in the category of 'non-western societies'. In contrast to British perceptions, Hindus and Muslims did not appear to be two distinct homogenous entities, governed by rules written down in a divine book. It was difficult to appreciate that Hindus nurtured a very different understanding of religion, where religion, as Derrett pointed out, was more a social phenomenon than being a belief in the existence of one definitive figure.²²⁰ Nor there was available any central institution which could be seen as a final word on the dictates of religion. For the British, requirement was to respect religious beliefs of a society where understanding of religion depended on individual conscience. The British had to deal with a society where allegiance to religion did not call for passive submission to some norms which could be termed religious or divine. It was a

²²⁰ Derrett, *Religion, Law and the State in India*. Derrett in this work has extensively and eloquently explained specific characteristics of Indian society and its relationship with religion. Explaining perceptions about religion in India Derrett noted at one place,

The first characteristic, which plays a large part in the Indian make-up, is the non-confinement of 'religion' to personal belief, and its persistence irrespective of personal belief. One is free to have any and every belief or no beliefs at all, without forfeiting one's religious denomination or affiliation. On the other hand, if one's social status is disturbed it would follow that one's religion is likewise in doubt. Religion is thus a social phenomena, and the character of the religious observance or right to perform a religious observance depends upon factual membership of a group. (At p. 57)

Derrett further noted,

Religious affiliation is not a question of an individual's belief, for on that footing he is free to believe or not believe in anything he likes, but of a *social belonging*. (emphasis original) (At p. 58). "A Hindu can have Christian or 'reformed' beliefs alongside his ancestral beliefs." (At p. 59)

Drawing attention towards flexibility inherent in Hinduism as a religion Derrett further emphasised

Groups can deny the value of Vedic worship, can renounce 'superstition', can agree amongst themselves to have different marriage ceremonies and improve the tone of their little society in other ways: they are still Hindus, for Hinduism rejoices in never excluding a member for personal heterodoxy the chief reason why it is contended that Hinduism has no creed. Whatever Hinduism is, its members are supposed to live it as a matter of observance and irrespective of personal opinion. It is not altogether surprising that that some Christians who have cross-communal interests and social ambitions should be found to have assumed a position in which, as with many Muslims, it is possible to contend both that they are Hindus and that they are non-Hindus- to the occasional embarrassment of the courts. (At p. 60)

For further explanations also see Sarvepalli Radhakrishnan and Charles A. Moore, eds., *A Source Book in Indian Philosophy* (Bombay: Oxford University Press, 1957).

worldview which allowed constant contestations on Truth, which allowed idea and form of God to be questioned and challenged constantly.²²¹

Colonial rulers were required to carve out religious and secular domains for a society for which whole life field was sacred, where every life sphere was seen to be integrally interlinked, and where each action as well as inaction was believed to carry effects on cosmic harmony.²²² Thus, for the British, challenge was much bigger than finding and translating one or few law books of Hindus. A greater challenge was finding answer to a more basic question- who is a Hindu? Accommodation, absorption and acceptance of diverse practices having been an internal criteria for Hinduism, 'Who is Hindu' as a 'legal' question, had never been a central issue in pre-colonial India. However, it became the central question in the colonial period as

²²¹ See Naresh Dadhich, "The Indian Plural Mind," *Economic and Political Weekly* 49, no. 10 (2014): 39–46. Highlighting pluralism inherent in the concept of *dharma* Dadhich notes,

Since at its very conception it has to accommodate various different conceptions and formulations of belief, language and behaviour, it has to have sufficient flexibility and elasticity in its thought structure for accepting and appreciating this profound heterogeneity. Take, for example, the various sects/*sampradayas* of Hinduism, which themselves are so varied and diverse that each one could almost qualify as a separate faith. That is why its true perception calls for a plural mind. There is no one single perception of God and no prescribed unique way to reach him. Above all, there is also room for the non-believer, which is a great strength as it co-opts its own opposite. It is, therefore, almost impossible to defy it. If one is born a Hindu, one is condemned to die as one because there is no well-defined code the defiance of which could lead to exclusion. It is loosely accommodative of almost anything. (At p. 40)

Also Robert D. Baird, "On Defining 'Hinduism' as a Religious and Legal Category," in *Religion and Law in Independent India*, ed. Robert D. Baird (New Delhi: Manohar Publications, 1993), 41–58.; Lingat, *The Classical Law of India*. Highlighting diversity as an internal aspect of Hinduism Lingat noted,

The Brahminical religion is a tolerant religion whose dogmas are very wide and capable of encompassing the most diverse metaphysics. It follows that no interpretation could derive authority from the number of those assent to it. Its authority derives solely from the logical and moral value of the teaching involved. (At p. 16)

²²² See Derrett, *Religion, Law and the State in India*. Drawing attention towards the difficulty in dividing life spheres into secular and religious Derrett noted,

In fact the unbroken tradition of Hindu legal scholarship has emphasized the concept that the Hindu law concerns itself with eternity and with morality judged against the greater background, and not with material, temporal considerations. 'In the Indian view all conduct rests on a suprasensible basis. This leads to a fusion of religion and morals, which is reflected in the existence of only one word in Sanskrit, viz., *dharma* for both. In modern eyes, in an age in which secularism is upheld as the ideal and religion has long been ignored, such association may appear as an entanglement. The tradition Hindu view is different. Morality, to have effective force, must rest of supramundane sanctions. So said the greatest interpreter of the *dharamsastra* to his contemporaries, Hindu and non-Hindu, young and not-so-young. (At p. 101)

for the purpose of administration of Hindu ‘laws’ to Hindus, colonial authorities had to identify and label population of India according to religious affiliations.

For the British, religion based laws or divine law meant set of rules which can be found written in specific texts. However, in the Indian context, especially for the Hindus finding such a book was inconceivable. Hinduism was a religion which consisted of a rich body of literature and textual sources which could not be easily attributed to any specific author or authors.²²³ Nor was it possible to find one book which could be considered as the most authoritative one laying down a binding code of conduct for all Hindus. Despite a rich body of literature, among Hindus ascertainment of *dharma* – the right solution to a dispute or the rights and obligations of individuals in a given situation- was not a function of deriving rules from some textual sources which could be considered divine. Incorporating the understanding that balance will always be accompanied with imbalance, in Hindu society such ascertainment was as much a prerogative of an individual or a small group of people as it was for a specific class of people who could be called priests or *Brahmins*.²²⁴ Any community and even individual had the freedom to devise their own ways to relate to the cosmic Order as long as these ways allowed the same freedom to other communities and individuals, and were based on the awareness about the integral relationship between visible and invisible spheres.

The institutions of marriage and family were indeed seen as the most essential parts of life for every individual. These institutions were also projected and promoted by society as ways to serve the interconnectedness, to make one’s contribution in maintaining order. The rich and sophisticated body of literature provided an ideal

²²³ Glenn, *Legal Traditions of the World*. Glenn reinforces the above point as he states, What makes Vedas different, as revelation (aside from their content), is that there is very little insistence on their author, or on their author’s messenger. Some speak simply of revelation, others of gods, others again, as time went by, of God. And no one is identified as messenger or prophet, or saviour. It is a clearer case of revelation coming to be recognized as revelation, but apparently over such a period of time that its manner of revelation just slipped away. (At p. 254)

Also Menski, *Hindu Law*.

²²⁴ Jackson, “From Dharma to Law.” Highlighting importance of custom in pre-colonial India Jackson noted,

In India custom appears to have been both a source of *dharma* and an instrument in its implementation as law. (At p. 498)

form for establishing intimate, personal relationships between individuals. However, allegiance to the texts was not a requirement for a marriage or a family to be called as Hindu marriage or Hindu family. However, it was a system where maintaining order or balance in cosmos was not a function of passive, unreflective submission to sets of norms given by a divine authority. There was more emphasis on duties of every individual with the prominence to the concept of *svadharma*. Family, caste, community and scriptures played extremely important role in an individual's life providing guidance to every individual about rights and obligations. However, the final decisions relating to what is one's *svadharma* could be left on each individual or his or her immediate social group. There was also a clear understanding that the textual norms were not to be enforced through coercion.²²⁵ It was not a system where all individuals conducted their lives with passive submission to the dictates of caste, community or family.

Far from suppressing human agency, expectations from individual was to exercise human agency to discover one's individuality, to understand one's position and one's duties in the cosmic web and to find ways to contribute in the maintenance of order, in microcosmic as well as macrocosmic spheres. It was a system which was individualistic in essence, as embodying the theory of *karma*, it encouraged and expected every individual to make decisions of right and wrong and to accept the responsibility for one's decisions in the current life or even in subsequent lives.²²⁶

For the colonial rulers the requirement was to find rules which would govern all Hindus of the country while the Hindu society believed that no two groups of people could be considered to be governed by the same set of rules. The British needed to discover divine laws for that society where law making in positivist fashion to govern the society was a foreign concept. The colonial administrators needed to provide judicial forums embodying adversarial system as the method of dispute resolution for a society where contests/disputes between people were rarely seen as a fight between two or more adversaries or a contest between a right or wrong. It was

²²⁵ Derrett, *Religion, Law and the State in India*. Also see Robert Lingat, *The Classical Law of India* (USA: University of California Press, 1973).

²²⁶ Menski, *Hindu Law*. (Chapter three)

a system where every dispute resolution was treated as a contest between two rights and where adjudication was not limited to application of abstract rules to a fact situation. It meant, instead, finding most appropriate solution in a situation. By middle of the nineteenth century, as the colonial rule advanced, there had become available enough evidence that a large section of Hindus were governed by customs.²²⁷ British rulers were also gradually realising that treating *shastras* as the law books may be problematic as one could prove practically anything from the *shastras*.²²⁸

The context of colonial rule, however, was not the time to take cognizance of the above facts. Sensitivity towards traditions would have required questioning the claims of the British superiority. It would have required challenging colonial administrators' belief in superiority of Western religions and the western understanding of law. It also would have required accepting the fact that huge diversity and plurality in India was not a result of inability of natives. Above all, the

²²⁷ See Derrett, *Religion, Law and the State in India*. Referring to the ill-founded opposition between custom and law Derrett's work as claimed by the author himself sets out incidentally to destroy that

Law in India was immutable, immemorial custom was transcendent law, and the customs and usages that bound the public were neither open to be influenced by the classical jurists (whose theories were thought to be largely academic) nor amenable to alteration at the option of a political superior. All that is false. There appears to have been no stage at which law was immutable, at which custom was not open to influence from jurists, or to modification or even abrogation at the hands of the ruler. (At p. 152)

Also see Kolsky, "Maneuvering Personal Law System in India." Kolsky points out,

As Britain's empire in India expanded, colonial authorities found that Hindus and Muslims in different regional locations followed customary practices that did not square up with the laws prescribed in the colonial digests. Recognizing the importance of local, tribal, caste and family usages, new textualization projects in the nineteenth century aimed to digest customary law. This, too, had a problematic effect. In Punjab, for example, the textualization of customary law reified the authority of written sources and denied the essentially fluid and changing nature of custom. (At p. 976)

²²⁸ Werner Menski, "Lost in Translation: The Monist Management of Colonial Hindu Law," in *Redefining Dharma and Well-Being* (INDAS International Conference 2013: In Search of Well-being: Genealogies of Religion and Politics in India, Ryukoku University, Japan, 2013). Highlighting this realisation Menski notes,

British officers found rich, 'thick' empirical evidence that whether a person or family was Hindu, Sikh or Muslim, specifically in Punjab, their daily legal actions were to a large extent determined by the laws of the soil, and thus normative patterns, rather than textual dictate. In other words, main source of law, certainly among rural people in this part of the world, was 'custom', however defined. (At p. 17)

requirement would have been to challenge the understandings about non-western societies, about the notion of progress and progressive society.

And, none of the above was a possibility in the context of colonial rule. Shedding belief in their own superiority for the sake of respecting traditions and religions in India was certainly not the possibility for the colonial rulers at the onset of the Empire.²²⁹ Moreover, requirements of the Empire did not offer colonial administrators luxury of time and resources to fully appreciate and address the complexities of a country with huge cultural and religious diversity. For British, a primary concern was a set (or sets) of clear, predictable, certain, and definitive rules, which could be linked to natives' religions, to govern different aspects of family matters.²³⁰ Not inclined to interfere in personal matters of the native population, the British saw their task as limited to taming the extreme socio-legal diversity to a set of abstract rules which could be deployed impartially by 'objective' and 'neutral' arbitrators.²³¹ In the context of colonial rule it was difficult to foresee that this process of discovery of laws will initiate a process of generating misunderstanding about Indian society.

²²⁹ Dhavan, "Introduction," 1989. Dhavan points out how colonial administrators like Nelson were aware that

Dharmashastras was not the actual law which governed local communities in their day-to-day folkways. The *dharmashastras* sought to create an enduring set of attitudes and beliefs rather than to actually supplant customary practices with the imperatives ordained by *rishis*. (At p. xv)

²³⁰ *ibid.* Calling process of discovery of 'native law' by British as egregious error Dhavan states that the process of discovery of law by British was as 'inexact as it was purposive'. (At p. xiv) Also see Cohn, "Law and the Colonial State in India." Commenting on the project of systematisation of law undertaken during colonial era Cohn noted,

Hastings encouraged a group of younger servants of the East India Company to study the "classical" languages of India- Sanskrit, Persian and Arabic- as a part of scholarly and pragmatic project aimed at creating a body of knowledge that could be utilized in the effective control of Indian society. He was trying to help the British define what was "Indian" and to create a system of rule that would be congruent with what were thought to be indigenous institutions. (At p. 136)

²³¹ Anderson, "Islamic Law and the Colonial Encounter in British India." Highlighting British attempts to tackle extreme socio-legal diversity Anderson noted,

The British confrontation with myriad forms of legal authority and variegated local practices highlighted one of the foremost problems of colonial control: how to obtain simple, reliable, and reasonably accurate understandings of indigenous social life without sacrificing great labour and capital. Law and legal institutions provided a solution. Equipped with indigenous advisers, colonial courts served as mechanisms of inquiry, while the classical religious-legal texts, whatever their genuine relevance, were taken as the key to understanding colonised cultures and societies. (At p. 172)

2.7 Undesirable Consequences of the Colonial Rule

In the context of colonial rule it was difficult to take cognizance of the fact that the rather objective and neutral process of discovery and systematization of laws for Hindus or Muslims would lead to significant distortions in Indian society or in the way Hindu law or Muslim Law or institutions of marriage and family were understood in India. In the context of colonial rule it was difficult to imagine for colonial rulers that their attempts to impart certainty and objectivity to Hindu law or Muslim law will give rise to something which would ultimately be labelled as a 'hybrid monstrosity' incorporating worst biases of both civilisations, Indian as well as British.²³² While colonial rule triggered emergence of distortions,²³³ creation or emergence of such distortions was not too difficult a task. First of all, in the context of colonial rule it was perhaps difficult to comprehend that the process of determining rules in the backdrop of colonial administrators' presumptions about non-western traditions will result into distortions and emergence of an artificial version of Hindu traditions as well as of Hindu law which not only could prove claims of British superiority but could also prove colonial rulers' understandings about non-western traditions in general and Hindu traditions in particular.²³⁴ It was difficult to acknowledge that the above process would entail a serious of undesirable consequences:

²³² Derrett, *Religion, Law and the State in India*. Derrett argued,

The British method of deducing the law from the European text writer's idea of what the pundits meant, coupled with whatever might be deduced from the translations of a few prominent Sanskrit legal texts, and put cheek-by-jowl with decided cases enabled the law to be deduced in a most artificial and remote manner, to the despair of scholars able to read the Sanskrit original authorities. (At p. 298)

Derrett points out at another place,

English procedural methods altered much substantive law, curtailing some rights and amplifying others. (At p. 308)

²³³ For a detailed description of process of emergence of 'Codes' at the instance of colonial administrators in 18th and 19th century see Derrett. Also Dhavan, "Introduction," 1989.; Menski, *Hindu Law*.; Cohn, "Law and the Colonial State in India." Commenting on the distortions created by the colonial administrators in the process of understanding Hindu law Cohn noted,

Jones, and especially his successor, Colebrook established a European conception of the nature of Hindu law that was to influence the whole course of British and Indo-British thought and institutions dealing with administration of justice down to the present. (At p. 146)

²³⁴ With respect to impact of colonial interventions on Muslim law see Anderson, "Islamic Law and the Colonial Encounter in British India." Also see Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law*, Reprint edition (Cambridge; New York: Cambridge University Press, 2011).

2.7.1. 'Religious' labelling of diverse communities as 'Hindus':

Accommodation, absorption and acceptance of diverse practices being internal criteria for Hindu family *dharma*, 'Who is Hindu' as a 'legal' question, had never been a central issue in pre-colonial India. However, it became the central question in the colonial period. For the purpose of administration of Hindu 'laws' to Hindus, colonial authorities had to identify and label population of India according to religious affiliations. This identification was at the cost of ignoring that there was greater similarity between customs and usages of people from a region irrespective of their religious faith and affiliations, rather than between followers of a religion living in far-flung regions.²³⁵ British administrators undertook 'religious' labelling of population as 'Hindus' on a criterion foreign to Hindu conceptual structure- concept of institutionalised religion with clear affiliations along the lines of Christian church fellowships.²³⁶ Result was construction of a narrow and rigid definition of Hindus, wherein the title Hindu came to be reserved for that group of people who were willing to agree that they were governed by norms written in *dharamshastras*. And since it implied application of uniform rules to all Hindus, only way for any group or community to claim exemption from application of newly emerging Hindu law and to be able to apply their own customary laws was to convince the court that they were out of fold of Hindu community. This delimitation of population on religious lines introduced new categories for Indian society such as, 'Hindus', non-'Hindus', communities on fringes of 'Hindu' population, less 'Hinduised' communities, more 'Hinduised' communities, 'communities (like *chamars*), who apparently know little of 'Hindu' religion and less of 'Hindu' philosophy'.

2.7.2. Shift in Centre of Activity from Community/group to the State

It was for the first time in the history of India, that centre of activity shifted from communities or groups to the state or to any centralised authority. It was the also the first time that state or its institutions became authoritative (and exclusive) custodians of scriptures and administrator of *dharma*. As Kolsky rightly points out

²³⁵ Agnes, *Law and Gender Inequality*. (At p. 23)

²³⁶ *ibid.* At p. 24

Not only did the colonial state determine the content of Hindu and Islamic law but personal law was also applied in state courts rather than in separate communal courts. The state did not allow communities to decide what their own law said on any issue, nor did it let them apply “their own” personal law through religious or community bodies. The personal law system in colonial India was, in fact, entirely state centered.²³⁷

2.7.3. Passive submission of groups/communities/people to the authority of Scriptures or written texts

Requirement of coercive and passive submission to the authority of the written texts and diminished authority of the diverse customs and usages of different communities was also an innovation that entered family matters of Hindus for the first time. Since British rulers believed that all Hindu law could be found in scriptures, it was a preliminary requirement for the ‘native priests’ (court assistants) to show that their opinion had scriptural authority. Although Hindu customary practices were not totally ignored or abrogated, but their recognition by the state authorities became dependent on stringent conditions. Unless it could be proved that the custom was ancient, certain, obligatory, reasonable and not against public policy, it had a very little chance of survival.²³⁸

²³⁷ Kolsky, “Maneuvering Personal Law System in India.” (At p. 977)

²³⁸ Derrett, *Introduction to Modern Hindu Law*. Commenting upon the place of custom in modern Hindu Law Derrett noted,

Despite solecism in Hindu Code, custom is (with very exceptions such as, marriage ceremonies) not part of Hindu law at all. It has not been so since about 1790. Custom is pleaded, if at all, in derogation from Hindu law, and thus must be visualised as its opponent, not component. (At pp. 12-13)

Also see John Duncan Martin Derrett, *A Critique of Modern Hindu Law* (Bombay: N. M. Tripathi, 1970). Derrett, *The Death of a Marriage Law: Epitaph for Rishis*. Writing about derogation of customs with onset of British rule Derrett noted,

In 1729, if any Hindu caste or subcaste had wished to abolish a particular practice it would have met in solemn conclave at a place of pilgrimage at an annual festival and, after endless discussion, decided that the practice should no longer take place and all offenders would be subject to a huge fine, and in default of payment they would be ostracised. By 1829 such procedures ceased to be effective since offenders would commence actions for libel, and defy the caste, and in any case get decrees from the courts which annulled the caste’s decision, since the latter would not be represented in the book law by which the courts were bound. Therefore all social reform had to take place for all castes concurrently and by statute alone if it was to be effective.The concept of statute as India’s *education* was born fairly early in British rule. (At pp. 80-81)

2.7.4. Submission of different communities to power of *Brahmins*

Due to British authorities' perception about priests as the authoritative and only authentic expounder of the religious 'laws', *Brahmins* whom they equated with priests gained new found authority and state backed power to interfere in family matters of different Hindu communities. Once again, this was the first time that Brahmins gained this power or authority, which the concept of cosmic order denied to them. Hitherto, in accordance of Hindu *dharma* different communities had internal mechanisms to minimise the intervention of anybody who could claim title of *Brahmin*, for all kinds of religious and personal matters. New Hindu family law deprived them of this freedom by according state backed power to those who presented themselves as *Brahmins* and to their opinions.

2.7.5. Subsumption of Diversity to Idealistic Norms

Hindu system consisted of a huge mass of literature written over different periods of time and from different range of people. The 'process of discovery' while giving place of pre-eminence to some written texts as source of 'law' resulted in dismissal, disregard or simple ignorance of a large number of texts thereby making a serious attack on the *dharmic* diversity.²³⁹ Sanskrit scriptures reflecting Hindu system's concern for dealing with balance and imbalance consisted of idealistic norms as guidelines for performance of *svadharma*. They also incorporated numerous and diverse deviations from these norms. One of the characteristic features of *Sastric* literature was presence of two streams, one representing idealistic norms and the other representing all kinds of deviations from it, and both were *dharmic*. In the process of discovering Hindu law, it was only the former stream that got recognition as 'legal' while the deviations or all the other diverse forms of organising family life was rendered 'illegal' or had fight a tough battle for legal recognition.²⁴⁰

Also Sharafi Mitra, "The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda," *Law and History Review* 28, no. 4 (2010): 979–1009.

²³⁹ Menski, *Hindu Law*. (especially chapter four, At pp. 156-185)

²⁴⁰ Derrett, *Hindu Law, Past and Present*. (At pp. 84-85)

2.7.6. Replacement of Flexible and Situation Specific Judgements for ‘Appropriateness’ with Fixed and Certain Rules

The process of discovery and application of Hindu ‘law’ inflicted a severe blow on the spontaneous growth of and flexibility in Hindu family *dharma*. Through the process of administration of ‘laws of *shasters* for Gentoos’ in official forums case law emerged as a new source of law embodying in the principle of *stare decisis* replacing the most elementary Hindu principle of justice²⁴¹ - no two situations can be same, which made consideration of facts and circumstances of every case as a paramount requirement.²⁴²

And, given the concern for proving Hindus as progressive, albeit in the terms suggested by British, not much attention could be paid to the fact that the core concept *dharma*, an entity, inherently dynamic yet unchanging, received a new impetus during colonial rule, an impetus aimed at remoulding it so that it can be understood by people nurturing different cosmo-vision. Attempt was made to set Hindu traditions and Hindu law on a path opposed to its spirit through efforts dedicated to getting an insight into it. It was also difficult to foresee that the new version of Hindu law and Hindu traditions will be different from common people’s understanding of their religion culture or traditions and that the new versions will

²⁴¹ Derrett, *Religion, Law and the State in India*. Derrett points out,

Precedent and the certainty that the law would not depend upon the personality of judges, but upon the skill of advocates and the court’s learning, were the pillars of the English system. The native system had always admired abstract justice from afar, but it applied only on levels where more pressing considerations were absent. That all men should be equal before law was an attractive presupposition only where defendant was a government official. The British judicial system, with its disregard for social distinctions, its dependence upon pleadings and evidence, its failure to take into account questions, which, although distinct from issues, were actually part of the same complaint in the eyes of the parties, and its harsh and rapid methods of execution-taking no account of the native genius for delay and contempt for the decisive- caused consternation. A flood of complaints and petitions occurred, and actual and potential defendants, guilty and innocent alike, were known to migrate into territories administered by native rulers until the abnormal times should end. (At p. 286-287)

²⁴² Lingat, *The Classical Law of India*. Lingat endorses the fact of diversity in Hindu law as he notes,

In the Hindu system no interpretation could fix the meaning of any shastric precept. They were always available for new interpretations. Shastric precepts contained within itself a variety of solutions permitting interpretation to diversify its effects according to plans and periods. English judge called upon to define law, fixed interpretation once and for all. Commentaries and digests that were only diverse forms of interpretation became fixated to different territories. (At p. 259)

not be able to displace the socio-legal reality²⁴³ or the values of ‘interconnectedness’ or ‘cultural and legal pluralism upheld by the ‘natives’.²⁴⁴ It was difficult to foresee for the British that their interaction with Indian society was an attempt to achieve the unachievable.²⁴⁵ However, as Menski aptly points out, that in the context of colonial rule, British as well as natives too did not realise the intrinsic polycentric power of *dharma* and also, therefore, could not anticipate to what extent this would raise problems for emerging state structures.²⁴⁶

2.8 Emergence of New Understandings of Hindu Law, Hindu Marriage and Hindu Family

2.8.1 Restricted Definition of Hindu Marriage

While plurality in solemnisation of marriages was an important characteristic of Hindu society, marriage as sacrament or *samskara* came to be reduced to certain specified rituals. Derrett described aptly the emerging rigidity in giving legal

²⁴³ Kolsky, “Maneuvering Personal Law System in India.” Also see Gauri Viswanathan, “Colonialism and the Construction of Hinduism,” in *The Blackwell Companion to Hinduism*, ed. Gavin Flood (UK: Blackwell Publishing, 2003), 23–44. Also Dhavan, “Introduction,” 1989. In introduction to Marc Galanter’s work on law and society in India Dhavan noted,

Galanter took the view that many of the modern legal system’s assumptions about Indian society did not correspond with social reality. The law reconstituted Indian society so as to dilute certain aspects of social reality and give prominence to others. In an unpublished paper, Galanter showed how the doctrine of *varna* was virtually invented by British law in the nineteenth century to preserve traditional mores in an otherwise rapidly changing society. (At p. xxxix)

²⁴⁴ Derrett, *Religion, Law and the State in India*. Citing various examples like law relating to adoption, inheritance etc Derrett stated,

A literate and obstinate adherence to sastric rules, misunderstanding their original purport, has at times produced situations inconsistent with the traditional Hindu background; the result is that the Anglo-Hindu system is occasionally more orthodox than sastra; or where the words have not been distorted the spirit has been abandoned. (At p. 310-311)

Also see Derrett, *Introduction to Modern Hindu Law*. Highlighting the difficulties in interpretation of Vedic texts Derrett stated,

Without the technique of Vedic textual interpretation, and knowledge of the cruxes of Vedic practical application, the words of the *smritis*, which were believed to reproduce the gist of Vedas, would be so much dead matter. The spirit counted no less than the letter, and the spirit was not acquired by reading alone. (emphasis added) (At p. 3)

²⁴⁵ Derrett, *Religion, Law and the State in India*. Drawing attention towards the zeal of reformers Derrett pointed out,

This is not to suggest that they imagined that they were foisting upon the remainder of the public something for which they alone had any use: they believed that sooner or later the remainder, the submerged six-sevenths of iceberg, would share their outlook and their needs. They were leaders and were giving to others as well as to themselves benefits which, in their view, had been withheld from them by the foreign government. (At p. 323)

²⁴⁶ Menski, “Lost in Translation.” (At p. 16)

recognition to pluralistic forms of marriages in India as he pointed out, “new ceremonies could not be invented, even by societies established to abolish superstitious rituals”.²⁴⁷ Amongst various rituals of marriage solemnisation one ritual, *saptapadi* (which was roughly presented as taking of seven steps before fire) came to acquire place of the essential ritual. Derrett highlights,²⁴⁸

Not every part of the customary ceremony was essential to its effectiveness, but the *saptapadi* (where in use) could not be omitted without risk of the marriage being declared void.

Recognition was attempted to the existence of diverse customary forms of marriage solemnisation, but to be recognised as a ‘legal’ marriage it was made necessary to prove that marriage was performed in ‘established customary form’. Other option available with different communities was to claim and convince the court about their non-‘Hindu’ status so that the marriages which were not performed in accordance with prescribed rituals ‘*samskara*’ could be considered ‘legally’ valid.

Concerned with managing co-existence of diverse groups while allowing them possibilities to function as autonomous units, Hindu system consisted of extensive norms, which recommended qualifications of a bride and a bridegroom in accordance with regional preferences for exogamic or endogamic forms of marriages. However, through the process of discovery certain ‘selected’ norms, came to be established as the ‘legal’ norms for any ‘legally’ valid ‘Hindu’ marriage. For example, some general preferences for selecting a bride such as, bride should be virgin, must not have been married previously, should be younger than bridegroom, got transformed into ‘legal’ requirements for a ‘legally’ valid marriage. Similarly preferences about degrees of prohibited relationship²⁴⁹ got fixed as ‘legal’ restrictions, thereby rigidifying the restrictions for marriages between different caste groups/communities resulting in rendering marriages performed in violation of those restrictions as illegal and consequently making it possible to deprive women or

²⁴⁷ Derrett, *Hindu Law, Past and Present*. (At p. 92)

²⁴⁸ *ibid.*

²⁴⁹ *ibid.* Derrett offers a detailed description of how rules relating to degrees of prohibited relationship were reduced to schools like ‘Bengal’ school, Benares school ignoring large variations within same geographical region. (At pp. 89-90)

children of such marriages rights of wife or legitimate children. Solution with different communities for rendering unions entered into violation of ‘legal’ restrictions was either to claim non-‘Hindu’ status or to prove their low caste status within ‘Hindu’ fold.

2.8.2 Hindu Marriages Rendered a Permanent Indissoluble Union: Ignorance of Customary Divorces

Perceiving marriage as a timeless cosmic union Hindu system strongly discouraged dissolution of marriage union. For Hindu ‘law’ given the trend of giving pre-eminence to idealistic stream within *shastric* literature, ‘Hindu’ marriage came to be established as a permanent union without ‘legal’ possibility of dissolution. Through this new ‘law’ claiming and proving indissolubility of marriage within one’s group also became a means to acquire higher social/caste status, given the propagated *shastric* interpretation that divorce or breaking of marriage unions can be undertaken only by groups lower in caste/social status. Derrett refers that perception of marriage as ‘permanent without possibility of dissolution’ is not the correct representation of the final position of *shastras*. He points out,²⁵⁰

The tenor of original texts seems to have been that a man or his wife could not voluntarily repudiate each other. The texts must be read against a background of the loosest behaviour. But the present *shastric* position ignores this historical fact and reads the texts which clearly admit divorce on certain grounds such as impotence, becoming an outcaste etc. as applying to another age, and not ours. The texts which lay down the permanency of the relationship between husband and wife and their “oneness” are held to apply to such an extent that even death does not release a wife from her husband, so that remarriage in any form is sinful, adulterous, and the remarriage of a widow in a *samskara* form impossible.

Given this definition of ‘Hindu’ marriage as permanent, indissoluble union, once again the strategy available with majority of the communities where customary

²⁵⁰ *ibid.* At pp. 112-3

divorces and remarriages have always been prevalent was to convince the court about their non-‘Hindu’ or lower caste status.

2.8.3 Hindu Women Denied Right to Own Property

In matters concerning economic entitlements women became victim of British adjudicators preference for ‘freeing the individuals and their property from customary constraints’, of their perception about lower status of women in Hindu civilisation and of their English background which did not allow property rights to women.²⁵¹ Preference of the Hindu system for male heirs as ‘absolute’ owners got converted into ‘legal’ right amidst complete ignorance of the fact that according to Hindu *dharma* women could also inherit, own and manage property. Urgency to make certain and clear Hindu law available in written form for British adjudicators, especially to deal with property matters caused its reduction into two schools: *Dayabhaga* and *Mitakshara*.²⁵² Economic entitlements of women were constructed along the perception that Hindu system allows ownership rights only to the male members and therefore women can be ‘legally’ entitled only to receiving maintenance from the joint family property.

We discussed before that the institution of *stridhana* (women’s property) in the Hindu system safeguarded women’s economic entitlements and also allowed them exclusive rights on property, both moveable and immoveable. It was also discussed that *smritis* from medieval period lead to inferences about increasing scope and extent of *stridhana* in later years. One comes across in *Mitakshara* expanded scope of *stridhana* to include property acquired by woman through every source, including inheritance and partition. Through new ‘law’ exclusive rights of women in *stridhana* were imparted a ‘limited’ character. Judicial decisions giving rise to a body of Hindu

²⁵¹ Agnes, *Law and Gender Inequality*. Agnes quotes comments of an English judge in case concerning property dispute as one of the evidences of this perception,

A custom for females to take no share in the inheritance is not unreasonable in the eyes of the English law for it accords in great part with the universal custom, as to real estates where there are any male issues and with some local custom mentioned by Blackstone through which in certain manors females are excluded in all cases. (At p. 51)

²⁵² Menski, *Hindu Law*. (At pp. 172-3)

‘law’ excluded property received by a woman through inheritance from the category of *stridhana*. Agnes points out,²⁵³

A new legal principle was gradually introduced through court decisions that whether the property is inherited by a woman through her male relatives (father, son, husband) or through her female relatives (mother, mother’s mother, daughter), it is not her *stridhana* and that it would devolve on the heirs of her husband or father. Women lost the right to will or gift away her *stridhana* and it acquired character of a limited estate. Any transaction by a widow in respect of property inherited by her had to be justified on two grounds, ‘legal’ necessity or religious or charitable purpose.

Through case law English concept of ‘reversioners’ found an entry in Hindu *dharma*, according to which upon widow’s death property reverted back to the husband’s male relatives. Introduction of this concept bestowed upon the male relatives the right to challenge all property dealings by Hindu widows. Agnes draws attention to courts cases, which ruled that property inherited by a daughter from her father was not her *stridhana*. Courts extended this principle to property inherited by an unmarried daughter from her mother and also to property inherited from all female relatives, thus sealing all avenues for the continuation of property devolution.²⁵⁴

Based on ‘selected’ norms from *Sastric* texts in ignorance of diverse customary rights Hindu family ‘law’ came to consist of rigid and gender biased norms regulating economic entitlements of family members. These restrictions which became representative of ‘Hindus’ family ‘laws’ rendered it necessary for women which came to deprived of their traditional rights to hold property and other economic entitlements, to convince the court about their non-‘Hindu’ status or to claim a lower caste status or to claim that their community was ruled by Muslim law or should be covered under Indian Succession Act, 1925, in order to claim protection which their customs allowed. If court was not convinced and ‘bestowed ‘Hindu’

²⁵³ Agnes, *Law and Gender Inequality*. (At p. 47)

²⁵⁴ Ibid. At p. 48

status upon the communities' women could be deprived of their customary/traditional rights.

2.9 Relationship between Law, Gender Justice and Diversity: Impact of Colonial Distortions

While not inclined to interfere in personal matters of Hindus, an important demand of the colonial Empire was to create a version of "traditional" which could be posited against modern and could also be shown as backward, primitive, oppressive and arbitrary.²⁵⁵ Confronted with Indian society, which did not really fit in the category of non-western traditions, the only options available with colonial administrators were to ignore, to create distortions or to choose those elements from the natives' worldviews, which could prove the claims of British superiority and substantiate the following beliefs: (i) that unwritten customs and oral traditions were features of 'primitive societies', (ii) that progress required transition from a society governed by unwritten pluralistic customs or religion-based norms to the one governed by uniform and secular written laws. It also needed to be proved that despite being progressive as compared to other Asian and African societies, India had remained a backward and static society as compared to the European society due to influence of religion on all spheres of life, especially on legal sphere or not having been able to carve out distinction between a religion based private sphere and the secular public sphere. For British, the requirement of the colonial rule was to garner evidence to establish that influence of religion and tradition signified expectations of passive submission to the authority of priests and also to the set of immutable, eternal norms with no scope for exercise of human agency and freedom to individuals to choose one's own way of life. With respect to the institutions of marriage and family, it needed to be shown that (i) these were religious institutions governed by the priests and the norms written in *dharamshastras*, (ii) society in India gave importance to these institutions due to influence of religion on law and

²⁵⁵ Dirks, "Foreword." Describing the process of interaction between Indian society and colonial rulers Dirks noted,

Cultural forms in society newly classified as "traditional" were reconstructed and transformed by and through this knowledge, which created new categories and oppositions between colonizers and colonized, European and Asian, modern and traditional, West and East. (At p. ix)

(iii) sanctity of the these institutions was maintained by denying social, economic and sexual freedom to women. With respect to the institution of marriage it also needed to be proved that being a sacrament it was an indissoluble union especially for women, with no possibility, whatsoever for a woman to leave her matrimonial home, howsoever oppressive was the marital relationship. Need of the hour, for British, was to make natives realise, degenerate nature of their civilisation, so that demands for 'fundamental transformation' in Indian society and establishment of British political and legal institutions could arise from 'inside the society'. And the above result could be achieved by the colonial rulers by the time they left India, ironically, despite the policy of religious tolerance. Because all that was required to be done to achieve the above result was to obscure or under-emphasize those elements of the Hindu worldview which rendered *dharma* as an inherently plural concept.

By the time the British left India, a strong case for abolition of influence of traditions had been made as, following presumptions were fully in place: (i) that pluralistic forms of marriage solemnisation and practices of dissolution of marriage were anti-Hindu practices- signs of degeneration in Hindu religion and traditions; (ii) that customary laws and informal methods of dispute resolution were signs of backwardness and arbitrariness; (iii) that situation of women can be improved only by transferring complete control of family matters to the State and its legal system; (iv) that sanctity of institutions of marriage and family was maintained through denial of individualistic rights such as right to divorce, right to maintenance, right to property to women; (v) that reform of Hindu laws along secular lines to incorporate similar changes as have been made in the family laws in the West, will reduce importance of sanctity of marriage and the institution of family in Indian society.

Emergence of the above-described version was not too difficult a task when a significant section of natives came to accept the challenge to prove that India, Hindu law and Hindu traditions were progressive in terms of the framework suggested by

the British.²⁵⁶ Showing *dharamshastras* as law codes and equating *dharma* to a set of written rules received from heaven was possible once natives accepted that progressiveness called for elements like: monotheism and a society governed by written, codified, uniform laws.²⁵⁷ Everything else, lack of a definitive centralised authority, societies/human groups governed by oral traditions or unwritten customs, pluralistic forms of marriage formation and dissolution, were all to be seen as primitive or backward. There wasn't available the luxury for discussing nuances of Indian worldviews, which did not lend themselves to the binaries of family v individual or religious v secular or *dharma* v custom.²⁵⁸ There wasn't much time to show that the notion of 'individualism' actually related to a very specific anthropocentric worldview which was very different from the Hindu worldview, which did not impart any position of superiority to human beings vis-a-vis other elements in the Universe. Also, establishing Indian society, in need of reform through the instrument of law was not difficult once natives accepted that there was no possibility of individual growth and exercise of human agency to choose one's own way of life in pre-colonial, traditions' bound India, due to the fact that Indian society was governed by 'divine laws' which, gave more importance to family not to individuals, to duties and not to rights.

Having accepted codification as a sign of progress, it was not possible to prevent emergence of one scripture as a 'code of law' which could be presumed to be governing Hindus in all matters, especially the family matters. By the time British left, there had come into existence a version of Hindu law and Hindu traditions, which denied range of social and economic rights to women, allegedly to deny them possibility to choose their own way of life and to keep them constrained to the institutions of marriage and family, irrespective of their wishes. It was a version of

²⁵⁶ For a detailed description on role of native population in making Indian religions and traditions fit the framework offered by the British see Richard King, *Orientalism and Religion: Post-Colonial Theory, India and "The Mystic East"* (New Delhi: Oxford University Press, 1999).

²⁵⁷ Menski, *Hindu Law*. (especially chapter 2)

²⁵⁸ Dhavan, "Introduction," 1989. Drawing attention towards distortions of native law in the process of its discovery Dhavan highlights how by the end of 19th century

Legal scholarship turned to servicing the lawyering and litigational needs of Anglo-Indian law and paid lesser attention to the deeper pre-British tradition that governed decision making in civil society. (At p. xv)

Hindu traditions, wherein being a woman meant accepting a life of sexual slavery and of absolute moral and economic dependence on men.

There were voices within natives, who challenged the idea of reducing Hindu marriage to sexual, moral and economic oppression of women or of labeling of Hindu traditions as backward and non-progressive. Demands for reform or secularization of Hindu laws could be generated easily once natives were willing to accept two things, first, that Hindus were a homogenous community governed by a body of uniform, coherent rules which were codified in a scripture named Manusmriti. Second, that these rules denied social and economic rights to women, such as right to divorce, right to separate residence and maintenance, right not to marry, right to remarry and right to own property. And the worst effected in this process were the institutions of marriage and family which were deprived of their plurality. And, as Menski points out, strangely enough, it was the above version of Hindu traditions and Hindu laws which was fully owned by the natives, something which natives wanted or needed to defend from 'westernisation' and 'Europeanisation'.

By the time of independence, British had succeeded in making at least a section of society believe about 'degenerate nature of Hindu traditions' and in raising the demand for change from the natives themselves. It had also been possible to identify certain practices which appeared anti-women, such as child marriages, sati, prohibition on widow remarriage, and label them as core practices of Hindus. However, it was difficult to see that legislations prohibiting above practices would not result into writing off of core values underlying Hindu traditions and Hindu laws. It was difficult to see that legal reforms, new laws made by the State would not be able to disturb core values of interconnectedness between individuals and family, between individuals and larger cosmic order. It was also difficult to appreciate that legal reforms, which granted rights to divorce or to own property would not be able to undermine the sanctity of marriage and family in Indian society. It was also not possible to foresee that transferring complete control to state for regulation of family matters, especially for formation and dissolution of

marriages would remain a far-fetched dream. However, context of colonial rule had closed the possibilities of taking cognizance of above facts.

At the time of independence there was no reason to doubt the belief that eradicating influence of traditions was essential, and that this influence could be removed by repealing and replacing *dharamshastras* and substituting them with secular laws made by the state. For those, who wanted to show sensitivity to traditions, there were only two options- to accept 'abolition of *dharma*' under the guise that *dharma* or Hindu law, in contrast to other religion based laws, was a flexible, progressive entity, ready to accept changes or to project reform of Hindu law, the process of secularisation of Hindu law as a means for return to Golden past, to address aberrations that had become part of Hindu traditions. There wasn't available any option to challenge or question potential of law to bring about fundamental transformation in Indian society, although there existed possibilities to nurture different understandings on what fundamental transformation would mean. As Derrett aptly describes, at the time of independence and some decades after that the "reformers seriously understood that the *dharmasastra* could be *repealed*, and that all that was necessary for legal and social change was legislative enactment."²⁵⁹ It was also unquestionable that progress meant achieving transition from a stage where society is governed by religion based or customary laws to a stage of being governed by state promulgated secular laws.

However irrespective of the emerging belief about relationship between law and Hindu traditions, the fact remained that the process of uniformisation of Hindu law was manifestly only a fragment of the entire field and of the social reality of Hindu law. The conceptual framework and ideologies underpinning multiple ways of life, and hence the entire customary social edifice of Hindu culture, remained largely immune to the powerful wonder-drug of legal modernisation which had been administered in measured doses since well before 1947 and was again used during the 1950s and thereafter. While the reformed Hindu Marriage Act, 1955 was projected as a code to govern all Hindus, at the time of independence and soon after

²⁵⁹ Derrett, *The Death of a Marriage Law: Epitaph for Rishis*. (At p. 67)

that it was not possible to take note of the fact that this very Code embodied all the diversity, as far from curtailing, it promoted legal pluralism and legal diversity amongst Hindus giving legal recognition of all forms of marriage solemnisation and customary divorces.

However, emergence of increasingly uniform official Hindu 'law' in ignorance of customary practices of different communities gave rise to 'law' as an elite phenomenon, focussed on the written word. Given holistic nature of *dharma* and its concern for the whole context- social, religious, moral- in decision making, division of life into independent and distinct domains was an innovation for Hindu society. There had also come into existence very peculiar challenges for the Indian legal system. Derrett succinctly described challenge for Indian legal system as he wrote,²⁶⁰

In unconscious conflict between *dharma* (righteousness) and mere law India has struggled, struggles now dramatically, and will struggle, and not least by way of matrimonial causes. The difference between a *dharma* problem and law problem is simply this, that in former cases all considerations, including the effect of various solutions upon the surrounding social circumstances, are taken into account at the point of decision, while a law-problem is solved by reference to predetermined rules worked out without reference to any particular persons, places or times, sometimes laid down by people quite unconnected with the parties and even residing in different countries and in different periods, and invariably obtained out of books and other printed paper! To jurists in ancient times, and still in various parts of India, the latter method of solving disputes seems gross and very amateurish. To the cosmopolitan scholar, of course, the former method is simply corrupt. There can be no reconciliation between the two, unless India will happen to be the first country to work it out.

However, the time of seeking independence from British was not really the occasion for scholarly discourses to even take cognizance of those challenges. As the above presumptions were dominant to socio-legal discourses at the time of independence in India, it was difficult to appreciate that even the reformed, modernised Hindu laws- such as Hindu Marriage Act, 1955 actually gave recognition to legal pluralism in marriage solemnisation and marriage dissolution or that courts in India will continue

²⁶⁰ *ibid.* At pp. 49-50

to hold marriage as sacrament, even after reformed Hindu law which grants right to divorce to all Hindu women. It was to take nearly half a century very idea of transferring complete control to state in matters relating to formation and dissolution met strong challenge even from the women groups.

Chapter Three

Relationship between Law, Traditions and Rights of Women in Post-Independence India: From Pre-1990s to Post-1990s Framework

Women's rights scholarship in India, mainly since late 1990s, has entered a new phase. While the period before the 1990s was of absolute faith and trust in the state and its legal system, in women's rights scholarship the period after 1990s has been a phase of disenchantment with law. This is phase wherein 'modernity' and associated elements such as rule of law, enlightenment philosophy and rights discourse, all that have been considered panacea for progress and empowerment of women in India since colonial era has come under challenge. It has been a phase of increasingly inter-disciplinary nature of women's rights scholarship, wherein, in contrast to the pre-1990s phase engagement with law is not a prerogative only of 'legal scholars'. Scholars across various branches of social sciences are no longer willing to follow, what is now seen as a simplistic idea of keeping faith in potential of law to bring about social change. Scholars from different disciplines no longer see their role limited either to highlight those areas where law has not been yet able to bring about change or to suggest social and other non-legal means to support state and its legal system to ensure better implementation of laws. Even, the legal scholars, no longer perceive their task as being restricted to (i) identifying laws which deny women equal legal rights, (ii) seeking legislative reforms to address denial of rights for women, or (iii) seeking better enforcement of new laws and legislative amendments which grant equal legal rights to women. Instead, concern of scholars from different disciplines, including legal scholars, in recent times has been to question, challenge and then engage with law and colonialism in a much deeper way. While the previous phase was about unquestioningly accepting role of law as an instrument of social change, the current phase is about doubting, questioning and deconstructing the role of law as an instrument of social change. The current phase, as some legal scholars²⁶¹ describe, is

²⁶¹ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 25)

About interrogating the ideological character of law in constituting and sustaining unequal power relations beyond the liberal understanding of explicitly discriminatory laws.

For socio-legal scholarship in India the post-1990s period has been a phase where scholars, drawing upon certain theoretical developments in the West, do not any longer accept the presumption that colonial rule initiated the process of women's empowerment and progress in India. In the inter-disciplinary feminist literature of recent years India's colonial past is, no longer, about the triumph of modern law and the trajectory of progress running through pre-colonial medieval India to modern India.²⁶² Instead, for current scholarship, the colonial past is about causing distortions, generating misunderstandings about Indian society. Current scholarship questions everything- the evolutionary theory of progress, understanding of personal laws as a homogenous set of rules received from heaven, anti-women perceptions about customs, preference for the uniform civil code as a key to women's empowerment- all that which was taken for granted till the 1990s. In sharp contrast to pre-1990s scholarship, the current streams are about accepting the fact that law everywhere exists in close connection with culture, politics or ideology and that the law, not even in the presumably secularized western societies, is a value-neutral entity.²⁶³

This chapter aims to highlight important changes that have come to characterise socio-legal scholarship concerned with rights of women in India. The chapter is divided into three sections. The first section draws attention towards the main features of the scholarship in the pre-1990s phase, wherein scholars perceived that colonial rule as a beneficial legacy for women. The second section highlights to what extent the scholarship in the post-1990s phase differs from that of the pre-

²⁶² Tanika Sarkar, "Rhetoric against Age of Consent-Resisting Colonial Reason and Death of a Child-Wife," *Economic and Political Weekly* 28, no. 36 (1993): 1869–78. Sarkar mentions, The historian cannot afford to view the colonial past as an unproblematic retrospect where all power was on one side and all protest on the other. (At p. 1870)

²⁶³ For changes in women's rights scholarship see Samita Sen, "Towards a Feminist Politics?: The Indian Women's Movement in Historical Perspective," Policy Research Report on Gender and Development (World Bank, Development Research Group/ Poverty Reduction and Economic Management Network, 2000); Herklotz, "Dead Letters?"

1990s phase. The third section draws attention towards new concerns of the women's rights scholarship in India. The last section looks into the significance of the changes that have come to characterise socio-legal discourses in the recent years.

3.1 The Pre-1990s Phase

3.1.1 Colonial Rule: A Beneficial Legacy

Women's rights scholarship in India, as in many other ex-colonial countries, is a colonial legacy.²⁶⁴ In recent years scholarly opinion is divided about whether this legacy can be considered a beneficial one or not. However, till few decades ago scholars, activists, policy makers and law makers- almost everybody concerned with social change- was convinced that their task was to finish the process of transitioning towards modernity, which had been left incomplete during the colonial rule.²⁶⁵ Transitioning towards modernity pre-dominantly meant, seeking separation between law and religion or law and traditions. It meant replacing pluralistic, customary or religion based laws with a set of uniform, homogenised laws promulgated by the secular State to govern family matters of all individuals irrespective of religion.²⁶⁶ Promulgation of the Uniform Civil Code, that is, transferring complete control of family matters to the secular state, was considered necessary to ensure transition of India from being a traditions' or religions bound conservative society, where family and community was considered more important than an individual to a modern progressive society, where an individual is

²⁶⁴ Sen, "Towards a Feminist Politics?: The Indian Women's Movement in Historical Perspective."

²⁶⁵ Neera Desai, *Women in Modern India* (Delhi: Vora, 1977). Presenting women's movement as a colonial legacy and transition towards modernity an unfinished process noted

Indian society experienced a qualitative jolt under the impact of the British rule. Along with the changes in the general life of the people, decisive transformation in the life of the Indian woman also resulted. In fact, in centuries' old history of the life of Indian woman, the British impact inaugurated a strikingly new phase of existence. Even after independence the currents engendered during the British period continue to operate. Though the hurdle in the form of foreign rule has been removed, the Indian woman has not still achieved complete freedom. (At p. xi)

²⁶⁶ Matrimonial matters in India, as is well known, are governed by four sets of, what are seen as, religion-based personal laws for Hindus (including Buddhists, Jains and Sikhs), Muslims, Christians and Parsis. In addition to the religion-based laws there also exists a special enactment, named the Special Marriage Act of 1954, which facilitates formation and dissolution of inter-religious marital relationships. These laws prescribe some norms for formal as well as material validity of the marital relationships. There has always been a demand for compulsory registration of marriages, however, in India non-registration does not render a marriage invalid. Section 8, Hindu Marriage Act, 1956

considered more important than family and community. The domain of family law was the main focus of scholars because family, scholars argued, was an area, where values of equality and freedom were yet to take roots, having been left by the colonial rulers to be governed by the natives themselves through the pluralistic religion based laws or customs given compulsions of the colonial rule and colonial administrators' reluctance to interfere in the personal or private sphere of the native population.²⁶⁷ The State in independent India was thus expected to take those strong measures against religions and traditions which a colonial government could not take.²⁶⁸ There was a common belief that with the advent of colonial rule India had made substantial march towards modernity in the public sphere,²⁶⁹ since it was possible for the state to promulgate secular laws to govern the matters relating to public sphere. Scholars were convinced that women's situation in India would improve and India would also be a progressive society only and only when the progress achieved in the public sphere could be repeated in the matters relating to family.²⁷⁰

²⁶⁷ Parashar, *Women and Family Law Reform in India*. Also, "Towards Equality." With respect to the shortcomings in the modern Hindu family law the commonly accepted justification, as stated in the famous report on status of women in 1974 was that

The hold of tradition, however, was so strong that even while introducing sweeping changes, the legislators compromised and retained in some respects the inferior position of women. By yielding to pressure, it sacrificed the uniformity which had been one of the major aims in introducing this law'. (At p. 135)

With respect to future of gender justice in India a common analysis suggested that due to deeply entrenched patriarchy and consequent gender bias of the male dominated state machinery gender equality in Hindu society is a far-fetched dream in spite of the fact that the Constitution of India guarantees sex-equality to women. Most authors agreed that 'since a very large section of our society still continues to be under the influence of traditional standards.' See "Towards Equality." (At p.7). For endorsement to above view also see Derrett, *Religion, Law and the State in India*.

²⁶⁸ For a strong support to this demand see Parashar, *Women and Family Law Reform in India*. Also "Towards Equality."

²⁶⁹ The important pieces of general legislations which came into existence during colonial rule were: The Civil Procedure Code, 1908; the Criminal Procedure Code, 1973; the Indian Penal Code, 1860; the Indian Evidence Act, 1872; and the Indian Contract Act, 1860.

²⁷⁰ Jeffery A. Redding, "Slicing the American Pie: Federalism and Personal Law," *New York University Journal of International Law and Politics* 40, no. 8 (2008): 941. Redding noted,

As much discussion of personal law makes clear, many people perceive personal law to be the law that the wild, savage, and uncivilized adopt. Whether they be Germanic tribes, or just Asians and Africans, or (in the case of India) the "pre-constitutional" people who live under personal law are often perceived to be pre-modern, non-western, and illiberal. (At p. 956)

During all these years, scholars were undoubtedly aware that the task of transitioning towards modernity- by modernising or secularising the sphere of family was a mammoth task. However, the difficulties in the process of transition were not sufficient enough to raise doubts about the feasibility of the task of transition. The path on which family laws in India were to move was supposed to be a well-tested path, already treaded by the West. The West was a success story as it had already transitioned towards modernity- to an era of reason, science and concern for human dignity in all spheres of life, public as well as private. And, the instrument that had made this transition possible in the West was: the modern law- a set of uniform, predictable, neutral rules promulgated by the secular state.²⁷¹ There was no doubt that the success story of the West would be repeated in India through the same instrument of law. All that was needed to be done was to replace pluralistic, customary or religion based pluralistic laws with a set of uniform, homogenised laws promulgated by the secular State to govern family matters of all individuals.

Moreover, the above task didn't seem impossible given the fact that the process had been started by the British with respect to at least one community- the Hindus. The British influence, and the reforms in the Hindu family law,²⁷² it was believed, had made it possible to initiate the process of secularization of the institutions of marriage and family for the Hindu community. A beginning had been made to displace the idea of marriage as a sacrament and to introduce effectively the idea of marriage as contract, by granting many individualistic legal rights to Hindu women, such as right to divorce, right to separate residence and maintenance and the right to own property. It had also been possible for the state to legislate against and also to

²⁷¹ Adda B. Bozeman, *The Future of Law in a Multicultural World* (New Jersey: Princeton University Press, 1971).

²⁷² Some of commonly cited examples of legislative reforms achieved during colonial period were: *the Hindu Women's Right to Property Act* in 1929 followed by another in 1937 which heeded to the plight of widows without any means of their own, depending entirely on the family; the *Hindu Women's Right to Separate Residence and Maintenance Act* in 1946, which *inter alia*, permitted the wife to live separate and claim maintenance from her husband on some grounds; in matrimonial matters it a shift from the sacramental character of marriage could be effected; the *Bombay Prevention of Hindu Bigamous Marriages Act*, 1946 and the *Madras Hindu (Bigamy Prevention and Divorce) Act*, 1949 were other enactments which provided improvements in the marital life of Hindu women; the *Shariat Act* 1937 which brought all Muslims under the Act and practically abrogated the customary practices which had grown over the years.

criminalise, what were seen as deeply religious and ancient practices, like *sati*, dowry, child marriages bigamy, and adultery. Women's rights scholars were convinced that 'the woman in independent India has come to acquire a better status in society than ever before in any period of India's history'²⁷³ only as a result of process of secularisation, homogenisation and uniformisation of pluralistic, traditional Hindu laws. Reforms in Hindu family laws had offered opportunities to Hindu women to break free of the religious beliefs and traditions which had confined them to the narrow sphere of family.²⁷⁴ Reforms in Hindu law, it was believed, had offered various opportunities for Hindu women to emerge as individuals, to be 'masters of their own will' and to claim an independent identity for themselves by fighting against the traditions, particularly Hindu traditions, wherein given its 'strong patrilineal structure' the roles of wife and mother were seen as the only proper roles for women.²⁷⁵ And, the steps which could be taken for Hindu women needed to be replicated for all women irrespective of religion.

²⁷³ Yaqin Anwarul and Badar Anwar, *Protection of Women under Law* (New Delhi: Deep & Deep Publications, 1982). (At p. 11)

²⁷⁴ Some of the oft quoted changes which have been claimed as revolutionary till recently were: (i) the principle of monogamous marriages: It was claimed that the 'spread of Christianity with its concept of marriage as a union for life of one man with one woman marked the first step towards the legal recognition of the principle of monogamy' and this principle came to applied for the first time for the Hindus with the enactment of Hindu Marriage Act, 1955, "Towards Equality." (At p. 104); (ii) Abolition of child marriages: Authors argued that furthering the measures undertaken during colonial period to raise the minimum age of marriage in order to curb the evil of child marriages, the Hindu Marriage Act, 1955 laid down as one of the conditions of marriage, the completion of 18 years and 15 years by the bridegroom and the bride respectively; (iii) Remedy of Divorce: It is repeatedly asserted that with the enactment of the Hindu Marriage Act, 1955, a novel remedy of divorce became a part of the law governing all Hindus; (iv) Equal rights of maintenance: The official report argued that the Hindu Adoptions and Maintenance Act, 1956 introduced another revolutionary measure in the Hindu family. Departing from the traditional concept which regarded woman only as a dependent and imposed the obligation for maintenance only on the husband, the co

modified Hindu law makes both husband and wife liable for bearing the expenses if the other spouse has no independent income; (v) Right to own property: It is pointed out that the Hindu Succession Act, 1956 passed 'after stiff resistance from the traditionalists' 'brought in some radical and fundamental changes, the most important of which was to introduce equal rights of succession between male and female heirs. (...) It also simplified the law by abolishing the different systems prevailing under the Mitakshara and Dayabhaga schools.' For a detailed discussion see "Towards Equality."

²⁷⁵ "Towards Equality." (At p. 40)

3.1.2 Awareness about Limitations of the State in dealing with Traditions in India

While law remained central to women's struggle till the 1990s, it was not the case that during all these years scholars' faith in law and their advocacy for uniform civil code or for equal legal rights to women were based on ignorance about the limitations of the State and its legal system in dealing with customs and traditions. Much like colonial administrators and the present day scholars,²⁷⁶ earlier too there was full awareness that law alone may not be able to change things for women. There was awareness that eradicating influence of religion from the private sphere- from the personal lives of people- will be an arduous task.²⁷⁷ The gap between law in books and law in practice was a matter of constant concern for legal scholars as well as scholars from other disciplines.²⁷⁸ Limitations of law in eradicating social evils like dowry and child marriages were highlighted constantly. Many scholars argued that in spite of the title modern, the reformed modern Hindu family law did not conform to the modern values, and that it had failed to achieve both the professed goals – uniformity and sex-equality.²⁷⁹ Authors often wrote to show that prohibition against bigamy, right to divorce, right to own property, and even idea of marriage as a contract remained merely theoretical possibilities for women.²⁸⁰ Judicial application of the modern Hindu family law was also a subject of critical evaluation

²⁷⁶ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 51)

²⁷⁷ Reflecting awareness about the limitations of law, the dominant view till the 1990s was that since a very large section of our society still continues to be under the influence of traditional standards dissemination of values incorporated in the Constitution will meet slow progress. "Towards Equality" (At p. 7).

Wendy Doniger O'Flaherty and J. Duncan M. Derrett, *The Concept of Duty in South Asia* (Delhi: Vikas Publishing House, 1978). Flaherty and Derrett also opined that the improvement in situation of women depends upon the speed with which the masses follow the rapid stride of the elite towards tomorrow's world in which individualism will be so pervasive that only two duties will need to be considered, towards oneself and towards one's country. (At pp. x-xi)

²⁷⁸ Roscoe Pound, "Law in Books and Law in Action.," *American Law Review*, 44 (1910): 12-36. Mautner, "Three Approaches to Law and Culture." For a critique of 'gap theory' see Dhavan, "Introduction," 1989. Also see Griffiths, "What Is Legal Pluralism?"

²⁷⁹ Parashar, *Women and Family Law Reform in India*.

²⁸⁰ Derrett, *The Death of a Marriage Law: Epitaph for Rishis*. Discussing stronghold of traditional values in Indian society including women Derrett noted,

The legal system, though it has been forced to react to the new economic and educational position of the upper-middle-class Hindu woman, is bound to take account, especially at the judicial level, of the traditional expectations of the older generation, and the still traditional self-image of the Hindu married woman herself. (At p. ix)

for a considerably large number of works²⁸¹ and authors also focussed on revealing gender bias in the interpretation and implementation of the reformed gender-neutral provisions.²⁸²

It was also accepted that law and legislative reforms alone, could not bring about a fundamental transformation in society and that desired changes in women's situation could be achieved only through intensive support of other social methods, such as education. There was available a realisation that formal equality by itself cannot bring about much change in the condition of women. Therefore scholars often reiterated that the struggle for equality included demands for both formal and substantial equality and for promulgation of laws which made special provisions for women keeping in view their differences from men.²⁸³

By the 1970s, it had also started to become clear that society in India was not keeping pace with legal reforms and changes.²⁸⁴ Expressing this realization, Derrett, writing in the late 1970s, noted,

the idea that the *dharmasastras* could be repealed, and that all that was necessary for legal and social change was legislative enactment, had started to appear 'careless and naïve'.²⁸⁵

While judicial separation or right of divorce was seen as a right in favour of women by the 1980s there had started to emerge scholarly analysis which showed that laws relating to bigamy, even divorce laws were not in interests of women.²⁸⁶ There were

²⁸¹ Derrett, *A Critique of Modern Hindu Law*. Also, Parashar, *Women and Family Law Reform in India*.

²⁸² Parashar, *Women and Family Law Reform in India*.

²⁸³ "Towards Equality."

²⁸⁴ Derrett, *The Death of a Marriage Law: Epitaph for Rishis*. Highlighting unchanging nature of Hindu marriage even after reform in marriage laws and enactment of the Hindu Marriage Act 1955 Derrett mentioned,

Marriage in India is worth what it was before, and the judges will see to it that that is what it remains. Modern styles, modern manners, modern aspirations will all have had their way: but a synthesis of the old and the new will leave the essence of the old in the ascendant. (At p. 44)

²⁸⁵ *ibid.* (At p. 67)

²⁸⁶ *ibid.* Drawing attention towards ineffectiveness of laws relating to judicial separation and divorce Derrett noted,

The new marriage-and-divorce law was made by a tiny elite to subserve people who believe marriage to be an affair of the spouses themselves, as modern world expects. How came they to facilitate a system whereby parents not only make a marriage by their more or less expert

disagreements amongst scholars on the relevance of the issues such as compulsory registration of marriage²⁸⁷ or ‘irretrievable breakdown of marriage’ as a ground of divorce²⁸⁸ for women in India. However, till the 1990s, this realisation about limitations of law in neutralizing influence of culture was not a reason good enough for doubting the belief that as an entity autonomous from society, law can neutralize influence of religion and traditions from society in India too. There was awareness that the field of personal laws would be the most difficult one to change, still change seemed inevitable based on the belief that British had set a trend in the right direction, which made it possible to interpret most personal aspects of life in terms of the Constitution’.²⁸⁹

3.1.3 Continuing Influence of Cultures on Law: Not a Reason to Rethink Antagonism between Law and Cultural Diversity

Till 1990s there was no reason to question the idea of law as an instrument of social change having potential to reconstruct society in accordance with modern values²⁹⁰ or to question law’s ‘autonomous character’. There was absolutely no reason to challenge the understanding that laws promulgated and implemented by a secular state possessed qualities like value neutrality, impartiality, objectivity, which were absent in the traditional understanding of law, will realise the aspiration of modernity for Indian society too.

The law made by the State was believed to have the potential to effect transition to modernity, as scholars were convinced that it possessed all those characteristics

betrothing, but can also end it while the children are still fairly young? A new weapon has been placed in hands of unscrupulous parents of, especially, boys and it is not utterly incongruous with any modern marriage law. (At p. 141)

²⁸⁷ For a discussion on relevance of compulsory registration of marriages in India see Agnes, *Family Law Volume I*. (At pp. 93-102)

²⁸⁸ Various divorce laws in India do not include ‘breakdown of marriage’ or no fault ground as a reason for dissolution of marriage but for the Muslim law which allow options to both men and women, though in different ways, to dissolve a marriage.

²⁸⁹ Rama Mehta, *Socio-Legal Status of Women in India* (Delhi: Mittal Publications, 1987). (At p. 163)

²⁹⁰ See Derrett, *The Death of a Marriage Law: Epitaph for Rishis*. While taking cognizance of continuing influence of religion and culture on Indian society and law Derrett was also hopeful that “there will come a time when the elaborate, ultra-modern apparatus of law will fit the social facts.” (At p. x)

which traditional laws were perceived to be lacking. Law in its traditional understanding was found to be deeply embedded in society, religions, ideologies, traditions; whereas modern law was believed to be an entity autonomous from society, promulgated by a secular state, distant not only from ideological subjectivities, but also unconstrained by categories like religion, caste, class, sex or ethnicity. Moreover, deeply embedded in society traditional law appeared biased and arbitrary, and tainted with local knowledge and particularistic practices, whereas modern law appeared neutral and objective- an embodiment of universalistic knowledge, humanistic values. Furthermore, while traditional law appeared to be concerned only with maintaining extant social order- maintaining differences between individuals on the basis of caste, sex, religion, ethnicity etc., modern law was presumed to be a force with the potential to reconstruct the society on the basis of higher principles, such as equality, freedom and dignity for all. In addition to the above, while law in traditional India was pluralistic, having different standards for different individuals, modern legal system was seen to be promising uniformity and neutrality- the blindness towards differences between individuals and therefore, the equality before law to all human beings.

Being convinced about potential of law as an instrument of progress, till the 1990s, the continuing influence of religions and traditions on law could simply be attributed to various reasons such as, high levels of illiteracy amongst women, under-enforcement of the existing legal provisions, inaccessibility of the legal system to Indian women, deeply entrenched patriarchy, economically disadvantaged position of women in an ex-colony, and political compulsions of a communally sensitive multi-religious country.

Maintaining belief in beneficial legacy of colonial rule, for feminists, the strong hold of tradition was not a reason either to negate the potential of state law or to give up the aspiration of neutralizing the influence of traditions from law and society. Therefore, till the 1990s, most works, which pointed out the gap between law in books and law in reality, highlighted, rather assiduously, the strong opposition from

the traditional conservative forces to the efforts for secularization of Hindu laws.²⁹¹ However, scholars advocating reforms were convinced that influence of traditional values was not strong enough to neutralise the impact of modern values and to kill the progressive spirit of legal reforms.

All these years there was no reason to question the task of seeking separation between law and traditions or to attribute the existing gap between law and reality to any kind of misunderstandings about the concept of personal laws, about indigenous traditions in India. There was no reason to link persisting influence of culture or law's failure in eradicating cultural diversity to misunderstandings about the concepts of law and religion, about the concept of personal laws. Scholars had no reason to question or challenge the understandings of the concepts of *dharma* or *sharia* as a 'book law' or to believe that the dominant scholarly understandings about these concepts were result of misconceptions about Indian worldviews. It was an unquestionable belief that progress meant moving forward on the same linear path, which the west had followed and where one end of the continuum was customs and the other was that of secular laws. There was a conviction that with adequate combination of legal and social measures- legal reforms which ensured formal and substantial equality and the social and educational reforms- traditional values of importance to the institution of marriage and family would come to be replaced with new, western values of treating marriage as a contract. Scholars were convinced that age-old concepts of subordination of women to family, to religions/traditions could be addressed through gradual reforms in family laws in India, on the lines of British matrimonial statutes.²⁹²

Perceiving legal pluralism and diversity as a root cause not only for backwardness of Indian society²⁹³ in general but also for women's problems, understanding in those years was that the legal fragmentation of Indian women not only thwarts the

²⁹¹ Jana Matson Everett, *Women and Social Change in India* (New Delhi: Heritage Publishers, 1981).

²⁹² Derrett, *The Death of a Marriage Law: Epitaph for Rishis*.

²⁹³ Redding, "Slicing the American Pie." Making a comparison with the United States, Redding gives a detailed description of the perceptions wherein legal pluralism has always been a sign of backwardness.

Constitution but strengthens the hold of religion on the mind of women and thereby distances them from the only concept of justice permitted to be recognised- that is the Constitution.²⁹⁴ Based on the above understanding one of the main concerns of the scholars was to ensure that the state takes care of this legal fragmentation and ensure that a uniform civil code came into existence to govern family matters of all individuals.²⁹⁵

Convinced of a close connection between law and progress, the concerns of women's rights scholarship across all disciplines till the 1990s were relatively simple. For the legal scholars the main concern was to identify the laws which discriminated against women and suggest legal reforms- to achieve uniformity in laws and to grant equal legal rights to women in all spheres of life, but more particularly in the private sphere of family. On the other hand for scholars from other disciplines the common tasks were: first, to draw attention towards continuing gap between law and reality, usually referred as the gap between law in books and law in practice, and second to understand, analyse and explain the reasons for the above-mentioned gap and to suggest social and economic measures to support the law and the state in its task of neutralising influence of traditions and religion.

There was no reason to presume that the problem of denial of rights to women could be structural, that law itself could be implicated in perpetuating this gap and reinforcing patriarchy. In contrast to the scholarship in the post-1990s phase, there was no reason to 'question law's commitment to social change' or to 'consider the role of law in subordination of women, beyond the discriminatory character of some laws.' Till the 1990s, it was an unquestionable presumption that Indian society has been initiated on path of transition towards modernity, as a result of colonial rule and introduction of the new understanding of law in Indian legal system. There was also no reason for scholars, especially the 'women and law' scholars to think that there may be emerging a new generation of feminism in India which would question

²⁹⁴ Krishan Mahajan, "Indian Women: Victims of Indian Constitution," in *Women, March Towards Dignity: Social and Legal Perspectives*, ed. Kusum (Delhi: Regency Publications, 1993). (At p. 92)

²⁹⁵ Vimal Balasubhramanyam, "Women, Personal Laws and the Struggle for Secularism," *Economic and Political Weekly* 20, no. 30 (1985): 1260–61.

their own understanding of law.²⁹⁶ Moreover, there was no reason to think that there would be emerging such theoretical developments in the western academics which will take away the comfort of the binaries of tradition v modernity, east v west, religion v secular, dharma v law and would question the very notion of progressiveness and backwardness, which formed the basis for superiority claims of colonial rule.

Till the 1990s it was unthinkable that- modernity, enlightenment philosophy, the idea of uniform civil code, the concern for transferring complete control of family matters to the State, rights discourse, criminalization of patriarchal practices like bigamy or adultery- all that was considered important for progress, for empowerment and upliftment of women will come under challenge. For women's rights scholars engaged in fighting cultural and legal pluralism, it was unthinkable that soon their understanding of Indian traditions will come under challenge. It was beyond contemplation that the new, modern understanding of law as a neutral, objective and autonomous entity, as a uniform set of rules, would acquire the label 'traditional', and concern of women's rights scholars would be to challenge this 'traditional notion' of law.²⁹⁷ It could not have been imagined that women's rights scholarship would put the idea of uniform civil code on backtrack and would come to see cultural diversity and legal pluralism as a source of empowerment of women. It was inconceivable that there would be a need to develop an indigenous version of feminism which could be sensitive to cultural diversity in India.

²⁹⁶ Pratiksha Baxi, "Feminist Contributions to Sociology of Law: A Review," *Economic and Political Weekly*, 43, no. 43 (2008): 79–85. (At p. 81)

²⁹⁷ As an example of this change see Flavia Agnes, *Family Law: Family Laws and Constitutional Claims*, vol. I (Delhi: Oxford University Press, 2011). As a forerunner for introducing insights of critical theory in India Agnes noted,

While challenging the premise of neutrality of law, I ground my arguments within feminist legal theory, posited as 'perspective scholarship' which challenges the *traditional notion that law is a neutral, objective, relational set of rules, unaffected in content and form by passions and perspectives of those who possess and wield the power inherent in law and legal scholarships*. Perspective scholarship adds the explicit consideration of diverse perspectives to the realist, law-in-society tradition and is based on the premise that certain groups historically have been unrepresented (or under-represented) in law and that their exclusion has led to biases and an incompleteness or deficit in contemporary legal analysis and institutions.....This scholarship adds nuance to the *traditional rather monotonous canvas of law*. (At p. xxiv) (emphasis added)

However, the unthinkable took place. By the end of the 1990s the idea of law as an instrument of social change came to be challenged. Finding it difficult to ignore the theoretical developments in the West under the rubric of ‘critical theory’, women’s rights scholarship in India came to challenge everything that was considered panacea for progress. Most important of all, modern law, one of the most important dispensations of the colonial rule, came to be displaced from its position of privilege as the only normative discourse guiding or controlling society. Once seen as a neutral terrain, an embodiment of objectivity and rationality, an entity autonomous from society, law was finally perceived as an entity deeply embedded in society. It came to be seen as a terrain imbued with ideology and cultures and values rooted in society.

3.2 Post-1990s Framework: New Understandings

Women’s rights scholarship in India has undergone tremendous changes in recent changes. Women’s rights scholars do not want to be seen as perpetuating the colonial legacy. An important change that have come to characterize the socio-legal scholarship in the last few decades is changing perception of scholars two important things: first, towards the impact of colonial rule of law and society in India and second, understandings about nature and role of modern law in women’s empowerment.

3.2.1 Changed Perceptions about the Impact of Colonial Rule: Colonial Rule-Not a Beneficial Legacy for Women

Women’s rights movement in India is a colonial legacy. While it was considered a beneficial legacy for any decades after the independence, scholars’ perceptions in recent years has changed. The recent decades have witnessed the emergence of considerable literature from different disciplines wherein a major concern of scholars is to highlight the negative effects of the colonial rule on Indian society. A major concern of scholars in recent years has been to demonstrate use of the law as an instrument for colonial expansion and imperialism. Colonial rule, scholars have been arguing, far from bringing about liberation and empowerment of individuals, has been about the increasing assertions of mythical western superiority for

denigration of non-western traditions and indigenous population.²⁹⁸ Colonial rule in the current streams of works is about creation of such traditional hierarchies where none existed, or about imparting inflexibility and rigidity to customs and traditions, to ways of living of people in India which was unknown before. Scholars in the current phase no longer accept the idea that the British rulers, given their policy of non-interference, did not interfere in the customs and religion based laws of the Indians.

There is now available rich literature from different disciplines which demonstrates the complex ways in which colonial rule had influence on women's issues.²⁹⁹ The concepts of tradition and modernity, east and west, which were once accepted as clearly distinct and mutually exclusive categories have now been problematised.³⁰⁰ In contrast to the earlier understanding where traditions were seen to be pre-existing colonial rule, recent works highlight in great detail how both the concepts of tradition and modernity were coming into existence simultaneously during colonial rule.³⁰¹

The concept of woman- the definitive, well-known entity, the oppressed being, the object of liberation and emancipation by modernity has been destabilized.³⁰² Instead

²⁹⁸ Some of the prominent works adopting this approach from disciplines other than law are: Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India," *Cultural Critique*, no. 7 (1987): 119–56; Kumkum Sangari and Sudesh Vaid, *Recasting Women: Essays in Indian Colonial History* (Rutgers University Press, 1990); Sudhir Chandra, *Enslaved Daughters: Colonialism, Law & Women's Rights* (Delhi: Oxford University Press, 1998); Uma Chakravarti, *Rewriting History: The Life and Times of Pandita Ramabai* (Delhi: Kali for Women, 1998).

²⁹⁹ Anshu Malhotra, "Empire, Nationalism and Women's Rights," *Economic and Political Weekly* 50, no. 26 (2007): 2504–5. Also see Veena Talwar Oldenburg, *Dowry Murder: The Imperial Origins of a Cultural Crime* (Oxford, New York: Oxford University Press, 2002). Presenting dowry as a crime which emerged in colonial era Oldenburg mentions,

We must look beyond the statute book to comprehend a central paradox of colonial policy in India that persists in post-colonial India: although the legislative record is indeed impressive, and includes the outlawing of several customs that underscored the bias against women, there was in colonial period a profound loss of women's economic power and social worth. This was a direct consequence of the radical creation of property rights in land. (At p. 3)

³⁰⁰ Mani, "Contentious Traditions: The Debate on Sati in Colonial India."

³⁰¹ *ibid.* At pp. 119-120

³⁰² Rajeswari Sunder Rajan, *Real and Imagined Women: Gender, Culture and Postcolonialism* (London; New York: Routledge, 1993). Sanjukta Ghosh, "Feminism in India," blog, Dissent Magazine, 2007, https://www.dissentmagazine.org/democratiya_article/feminism-in-india. Kapur, "The Tragedy of Victimization Rhetoric," 2002.

of lauding the contributions of colonial rulers in emancipation of women, scholars have highlighted how colonial rule was more an occasion for suppression of women's agency.³⁰³ Far from celebrating contributions of colonial rule in bridging the gap between tradition and modernity through legal reforms, contemporary scholars prefer to analyse the legislative measures of pre-independence as well as post-independence India to demonstrate the ways in which colonial rule was responsible for artificially creating the opposition between tradition and modernity.³⁰⁴

Legislative reforms dealing with traditional practices, the process of secularization, homogenization and uniformization of Hindu law, which were highlighted till the 1990s as significant contributions of the British in initiating the process of women's empowerment in India, are no longer treated as examples of positive influences of the colonial rule. A common concern of scholars during past decades has been to draw attention towards ethnocentrism involved in colonial policies- to demonstrate how every occasion for legal reform was an occasion to denigrate Indian cultures, to establish superiority claims of British³⁰⁵ and justify perpetuation of British rule in India.³⁰⁶ Scholars now argue that each instance of legislative reform, though

³⁰³ Mani, "Contentious Traditions." Offering an insightful analysis of debates around the issue of *sati* Mani mentioned,

Official discourse forecloses any possibility of women's agency, thus providing justification for "civilizing" colonial intervention. (At p. 130)

³⁰⁴ *ibid*, At pp. 119-120

³⁰⁵ Joanna Liddle and Rama Joshi, "Gender and Imperialism in British India," *Economic and Political Weekly* 20, no. 43 (1985). The authors state,

The colonial government may have wished to free Indian women from male dominance, but they did not intend to do so by allowing them equal voting rights. It would indeed have been difficult for British to agree to such a policy in India in 1919, since women in Britain were not granted the vote until 1928. (At p. 74)

³⁰⁶ Also see Nussbaum, "In Defense of Cultural Values." Nussbaum mentions

We should also remember that the equation of the entirety of a culture with old or change resistant elements is frequently a ploy of imperialism and chauvinism. The British in India harped continually on elements of Indian culture that they could easily portray as retrograde; they sought to identify these as "Indian culture", and critical values (especially those favoring women's progress) as British importations. At the same time, the British actively promoted antiscientific elements in Indian culture in order to prevent a development of science and technology in India that would threaten their continued hegemony. (At p. 391).

Agnes, *Law and Gender Inequality*. Talking about the politics of women's rights during colonial era Agnes states,

ostensibly meant for women, was in reality a terrain of politics, a terrain of contests between the economic, political and ideological interests of British and indigenous reformers. There is now available rich literature which aims to highlight limited understanding of local traditions and customs among colonial rulers which resulted into serious distortions in the way the concept of personal laws or the traditions came to be understood in India.

For example, offering incisive analysis of discourses around the legislation to ban *sati* Lata Mani highlighted how the discourses relating to *sati* were not primarily about women and their rights but about what constitutes authentic cultural tradition.³⁰⁷ Discussing the reform relating to widow remarriage Chakravarti shows that even as the widow remarriage law attempted to liberate the upper-caste widow from enforced widowhood, it denied her inheritance to the deceased husband's estate, thus ensuring her economic dependency. Once codified this law became applicable to all castes, including those caste groups in which widows were entitled to continue holding the inheritance upon remarriage. As a consequence this law set back the status of women from caste groups that granted more rights compared to the position of widows from the upper castes. Chakravarti's study of the emergence of *brahmanical* patriarchy in early Indian history shows how norms relating to

Since property and its regulation forms the basis of all civil laws, the legal systems located within feudal and capitalistic patriarchal moulds would necessarily be based upon anti-women stipulations to varying degrees. But within this universe of sexist biases, it is interesting to observe that at particular historical junctures, certain biases of a political system are either over-emphasized or undermined. (At p. 2)

Stating various positive dictates about property rights of women in Hindu law even in pre-colonial period Agnes further states,

These positive dictates are shrouded by an over-emphasis on practices, which are not contained in the *smriti texts*, just as the universally accepted principles of Hindu law- widow immolation and infant marriages- are not. These projections which rendered Hindu society barbaric, provided moral justification for colonial rule and its reformist scheme. During the corresponding period, undermining the issue of meagre economic rights of women, within an indissoluble marital bondage under the tenets of feudal Christianity then becomes a political mission. (At p. 3)

Liddle and Joshi, "Gender and Imperialism in British India." Arguing that British were not interested in women's position for its own sake and that they used women's issues for perpetuating British imperialism, Liddle and Joshi demonstrate that

The British had an interest in maintaining both women's subordination, and in liberalizing it, the former to show that India was not yet for self-rule, the latter to confirm Britain's superiority in relations between sexes. (At p. 73)

³⁰⁷ Mani, "Contentious Traditions." (At p. 122)

sexual purity and ideology of ‘*pativrata*’³⁰⁸ were deployed to gradually establish patriliney, sexual division of labour, and caste and class relations in society through the family. These norms served not only to control reproduction, sexuality, and property ownership within household, but were also crucial to distinguishing the upper caste from other castes and to regulating relations of gender, labour and property ownership within and between caste groups.³⁰⁹

Process of codification, which till few decades ago was considered most beneficial legacy of the British rule is now seen as a process of negotiating and cementing the status quo in relation to gender, caste, class, and nationhood.³¹⁰ Colonial administrators’ attempts to construct a homogenous version of Hindu law are also no longer seen as a part of beneficial legacy of the colonial rule. Instead, in recent years legal scholars have taken cognizance of the fact that the above attempts during colonial rule resulted in suppression of cultural and religion based differences and caused emergence of a rather homogenous version of not only Hindu law, Hindu traditions or religions but also of other religions, something which was alien to the religions or religion based laws in India.³¹¹ Scholars from different disciplines including legal scholars now show effectively that the colonial rule resulted in ascendance of ‘scriptural law’ or ‘textual law’, much at the cost of flexible local customs and traditions, which more often than not granted better rights to women.³¹²

³⁰⁸ *Pativrata* is a term used to refer to a lady with complete dedication to her husband.

³⁰⁹ Uma Chakravarti, “Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State,” *Economic and Political Weekly* 28, no. 14 (1993): 579–85.

³¹⁰ Chakravarti, *Rewriting History*.; Also see, Agnes, *Law and Gender Inequality*.

³¹¹ Mani, “Contentious Traditions.” Mani writes,

In meant that officials could insist for instance, that brahmanic and Islamic scriptures were prescriptive texts containing rules of social behavior, even when the evidence for this assertion was problematic. Further, they could institutionalize their assumptions, as Warren Hastings did in 1772, by making these texts the basis of personal law. Official discourse thus had palpable material consequences, of which constitution of personal laws from religious texts is perhaps most significant from the point of view of women. (At p. 122)

Also see Paul B. Courtright and Namita Goswami, “Who Was Roop Kanwar? Sati, Law, Religion, and Postcolonial Feminism,” in *Religion and Personal Law in Secular India: A Call to Judgement*, ed. Gerald James Larson (Bloomington and Indiana Pollis: Indiana University Press, 2001), 200–225.; Bina Agarwal, *A Field of One’s Own: Gender and Land Rights in South Asia* (Cambridge University Press, 1994).

³¹² Agnes, *Family Law Volume 1*. Providing a detailed account of construction of personal laws during colonial era Agnes writes,

In sharp contrast to earlier streams, the scholars no longer perceive legal reforms or process of codification as measures for empowerment of women or of giving them better rights than what they enjoyed in the pre-colonial period. Many feminist historians have shown how codification of laws relating to family has always been steered by dominant notions of public morality and the material interests of elite men in positions of power.³¹³ Drawing on the insights of inter-disciplinary work legal scholars have also shown how processes of codification were processes of combining worst biases of both systems of law in personal laws, much to the disadvantage of women.³¹⁴ There is available rich literature which demonstrates with rich evidence that the processes of codification of Hindu laws was merely a means to privilege and impose upper caste norms of Victorian or Brahmanical purity on the

During this time, several Sanskrit scholars wrote treatises to meet the British demand. But the work of European authors came to be trusted and used in preference even to genuine *shastric* works. The translated codes, backed by the authority of British courts, began to make alterations in custom. In their attempt to make the *shastric* injunctions precise and definite to suit the structure of the Anglicised adversarial court system, the British forced it towards a straight jacketed mould, which led to a loss of complexities and localized contexts. This also provided the scope for the biases of the English scholars to creep into the translated texts. (At p.6)

Joanna Liddle and Rama Joshi, "Gender and Imperialism in British India," *Economic and Political Weekly* 20, no. 43 (1985): 72-78, Liddle and Joshi mention,

Most Hindu law, apart from that of Brahmins, was unwritten and based on custom, which varied both over time and across cultural and regional boundaries. In contrast, Western law was written and based on the binding force of Parliament, applying uniformly to everyone and interpreted more rigidly as precedent developed. To bring Hindu law in line with the British concept, Warren Hastings, Governor of Bengal, decreed in 1772 that Brahmin written law should be the sole authority of all Hindus. (At p. 73)

³¹³ For example see Chakravarti, *Rewriting History.*; Chandra, *Enslaved Daughters.*; Mani, "Contentious Traditions: The Debate on Sati in Colonial India."

³¹⁴ Agnes, *Law and Gender Inequality*. Drawing attention towards colonial biases which influenced socio-legal discourses in India Agnes writes,

At particular historical junctures certain biases of a particular system are either over-emphasized or undermined. The quote from Manu that a woman must be protected by her father in childhood, by her husband in youth and by her sons in her old age, and that she is not entitled to freedom is common knowledge. But it is less well-known that Manu laid down comprehensive principles concerning women's separate property approximately two thousand years before the English legal system accepted this in principle, and issued the warning: Friends or relations of a woman, who, out of folly or avarice, live upon the property belonging to her, or the wicked ones who deprive her of enjoyment of her own belongings to go hell, or that Narada dictated that the husband must give one-third of his property to the first wife at his second marriage. These positive dictates are shrouded by an over-emphasis on practices, which are not contained in the *smriti* texts, just as the universally accepted principles of Hindu law- widow immolation and infant marriages- are not. These projections which rendered the Hindu society barbaric, provided moral justification for colonial rule and its reformist scheme. During the corresponding period, undermining the issue of meager economic rights of English women, within an indissoluble marital bondage under the tenets of feudal Christianity then becomes a political mission. (At p. 3)

lower caste groups.³¹⁵ It was a process, scholars argue, wherein those in power drew selectively upon the upper-caste brahmanical norms to homogenize Hindu law, in the process erasing the diversity of customs, many of which allowed women greater rights.³¹⁶

In contrast to the earlier phase where the scholars considered transferring control of family matters to the state as a sign of progress and advancement in India, one of the important concerns of family law scholars is to show how process of transferring control to the state became a means to impose rigid religious identities over different communities. Scholars have rightly highlighted that colonial rule created a context where the indigenous elite were under a pressure to claim an identity for themselves which was as progressive as that of the British, yet distinct.³¹⁷ Shamir and Hacker note,

A local elite was struggling to position itself at once on a par with British criteria of scientific competence and yet not as a mere proxy for British interests; at once able to articulate itself in terms of enlightenment concepts such as reason and modernity and yet celebrating its own distinct cultural authenticity.³¹⁸

Introduction of modern legal system- state-regulated and state-controlled adjudicative system which was once seen as one of the most beneficial legacy of British rule is now seen as a means to kill the complexity of indigenous systems and for bringing into existence an artificial notion of ‘personal laws’.³¹⁹

³¹⁵ Liddle and Joshi, “Gender and Imperialism in British India.”

³¹⁶ For some specific examples where women’s rights were curtailed see Chaudhuri, *Feminism in India*. Kapur, *Erotic Justice*.

³¹⁷ Ronen Shamir and Daphna Hacker, “Colonialism’s Civilizing Mission: The Case of the Indian Hemp Drug Commission,” *Law & Social Inquiry* 26, no. 2 (2001): 435–61.

³¹⁸ Shamir and Hacker. (At p.50)

³¹⁹ Agnes, *Family Law Volume I*. Agnes writes,

The transformation was at two levels: (i) through the introduction of a legal structure modeled on English courts which were adversarial in nature (that is, Anglo Saxon jurisprudence); and (ii) through principles of substantive law which were evolved and administered in these courts (that is, Anglo-Hindu and Anglo-Mohammedan laws). (At p. 5)

Agnes further wrote,

The new legal structure, based on the model of the English courts, necessitated the enactment of statutes. But the realm of ‘personal’ laws was spared from the process of codification as per the

Sardamoni³²⁰ uses example of the transformation of matriliney in Kerala in the early twentieth century to show how the process of codification undermined women's stable rights to matrilineal property. She points out that the new education system in that period generated transferable employment opportunities and ushered in changes in trade and landownership, thus creating the material basis for a change in property ownership. The new education also generated ideas and increased exposure to a homogenous brand of *brahmanical* Victorian morality that shaped the new nation, contrasted against which polyandry, the informal '*sambandam*' relationships (where the male partner in the relationship had the visiting rights) of Nayar women, and custom of 'visiting husbands' began to be viewed as concubinage. She further mentions that all these changes set the stage for codification, a process in which women did not participate, but which replaced '*sambandam*' relationships with monogamy and marriage. The process introduced women's dependence on the husband, and also diminished the stable and autonomous rights that women had in matrilineal property. For many scholars politicisation of the issue of women's rights during colonial rule and also in independent India is a matter of concern.³²¹ Scholars have attempted to show that legal discourses during the whole colonial period remained a terrain of politics, a terrain of contests between the economic, political and ideological interests of British and indigenous reformers.

assurance given in the Queen's proclamation. Despite this, the Hindu and Muslim family laws went through great transformation during this period. The establishment of courts based on rules and procedures of English courts, with a clear hierarchy of courts, was meant to take the arbitration fora certain along the model of English courts. While at the initial stage, scriptural law was awarded judicial recognition, after 1864, the British attempted to curtail use of scriptural law. The British interpretations of the ancient texts became binding legal principles and made the law certain, rigid and uniform. (At p. 8)

³²⁰ K. Saradmoni, *Matriliney Transformed: Family, Law and Ideology in Twentieth Century Travancore*, 1 edition (New Delhi: Walnut Creek, CA: SAGE Publications Pvt. Ltd, 1999). Also Leela Dube, "Matriliney and Women's Status," *Economic and Political Weekly* 36, no. 33 (2001): 3144-47.

³²¹ Chaudhuri, *Feminism in India*.

3.2.2 Changed Perceptions about Law and Legal Uniformity

3.2.2.1 Law and Legal Uniformity- Instruments of Oppression

Law, as has been previously stated, was one of the most potent instruments of the colonial rule. As described in the previous section, faith in law has been based on the understanding that modern law or the state law possessed all those characteristics like, value-neutrality, impersonal character, autonomy, objectivity, impartiality- which have been absent in the traditional law or non-western law. In recent years while law continues to play an important role in women's struggle for social change, scholars' perceptions about nature and role of law have undergone important changes. Recent scholarship is not about celebrating above characteristics of modern law.³²² Keeping pace with developments in the feminist legal theory in the West,³²³ scholars in India have argued that all those characteristics of modern law which were seen to impart superiority to it, are mythical.³²⁴ Modern law, women rights scholars in the post-1990s argue, has been an instrument used since colonial era to disguise the complex interplay of law, power and ideologies.³²⁵

Drawing upon insights of feminist legal theory in the West, family law scholars in India too accept that while law is presumed to always do justice, "it is always the

³²² One of the most prominent example of such scholarship is, Agnes, *Family Law Volume I*.

Also see, Parashar and Dhanda, *Redefining Family Law in India*. Parashar and Dhanda mention, Interdisciplinary study of law must become the norm, and the aspirations of legal theorists to conceptualise law as radically independent, or autonomous, would have to be given up. As Cotterrell argues, there is need to study both the doctrine, and the social, economic and political contexts of the doctrine, in order to be able to explain how legal change happens. ... While legal scholarship on the whole must broaden its horizons beyond the conventional concerns of the lawyers, there is an equally strong need for engaging scholars from other disciplines to analyse law and legal institutions. (At pp. xx)

Also see, Pratiksha Baxi, "Feminist Contributions to Sociology of Law: A Review," *Economic and Political Weekly* 42, no. 43 (2008): 79–85.

³²³ See Frug, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)." Highlighting the idea of law as gendered Frug stated,

Legal rules- like other cultural mechanisms-encode the female body with meanings. Legal discourse then explains and rationalizes these meanings by appeal to the "natural" differences between the sexes, differences that the rules themselves help to produce. The formal norm of legal neutrality conceals the way in which legal rules participate in the construction of those meaning. (At p. 1049)

³²⁴ Nandita Haksar, *Demystification of Law for Women* (New York: South Asia Books, 1986).

³²⁵ Nadine Taub and Elizabeth M. Schneider, "Women's Subordination and the Role of Law," in *The Politics of Law: A Progressive Critique*, ed. David Kairys, third edition (New York: Basic Books, 1998); Frug, "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)."

notion of justice held by dominant groups that is reflected in the laws of the region, which invariably causes injustice to the weaker and marginalized sections of society.”³²⁶ Ideas like instrumental characterization of law as a tool for the potential transformation of society, which once dominated women and law scholarship are now found too simplistic.³²⁷ Law which was once viewed as having unlimited potential to reconstruct the society according to some rational norms is now seen as a “crude device, circumscribed by the dominant ideologies of society in which it is produced.”³²⁸

For current scholarship women-friendly legislations do not present any kind of evidence of women’s empowerment or signs of success of women’s movement in India. Instead of recounting legislative victories of women’s movement, scholarly energies are now focused on reviewing judicial process and the processes of implementation of laws to show how even the gender-neutral laws can result in

³²⁶ Agnes, *Family Law Volume 1*; Erin P. Moore, *Gender, Law and Resistance in India* (USA: University of Arizona Press, 1998). Blaming men and Indian male judges, especially from North India, for perpetuating patriarchy Moore writes

Male elders and male judges at all levels of north Indian society are given the power to define what is behaviourally right and wrong. In many cases women are silenced, deprived of equal rights before law, and returned to their male guardians. In this way law contributes to the making of cultural hegemony by legitimating and enforcing a particular vision of the social order. This is the law’s patriarchy. (At p. 4)

³²⁷ Agnes, *Family Law Volume 1*. Also, Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. That Kapur and Cossman’s work represents a new phase in feminist legal scholarship in India becomes clear from the fact that it begins with the question, “is law an oppressive site?” (At p. 11). Considering ‘instrumentalist view of law as too narrow and restrictive Kapur and Cossman mention,

Many studies have been done reviewing the laws that impact on women’s status, and highlighting those laws that continue to discriminate against women. Our study moves beyond these reviews, and examines at a deeper level the contradictory ways in which the law is implicated in oppression of women. (At p. 12)

Also see Kalpana Kannabiran, “The Law, Gender and Women,” *Economic and Political Weekly* xlv, no. 44 (2009): 33–35.

³²⁸ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Explaining their endeavour in this work Kapur and Cossman mention,

We will attempt to move beyond the understanding of law as a simple instrument of either oppression or social engineering which has informed much of the earlier work on women and law in India. Building on the work of recent feminist studies, we argue that the role of law cannot be adequately captured by a dichotomous understanding of law as either an instrument of oppression or of liberation. We believe the terrain of law is much more complex, in both the oppression of women, and in its promise for challenging that oppression. (At p. 12)

Also see Erin P. Moore, *Gender, Law and Resistance in India* (Tucson, USA: The University of Arizona Press, 1998).

denial of justice to women.³²⁹ Giving strong evidence of changes in scholars' perceptions towards, law, Agnes emphatically highlights gendered nature of even gender neutral laws as she notes,³³⁰

Though 'adultery' is a ground for divorce for both men and women, the social and legal implications for the husband and wife differ widely. Historically, Hindu husbands had sanctions of polygamy and institutions such as concubinage and prostitution served to cater to men's polygamous and extra marital sexual desires. Hence as per popular perceptions of legality, adultery by men tends to be condoned, by community, law and even by wives themselves as their social status and economic rights depend upon their marriage. But in context of high premium awarded to women's chastity, any lapse on the part of women seem to be viewed far more stringently, leading to denial of maintenance and may even hamper rights to custody of children. Even innocuous terms such as 'cruelty' or 'desertion' which may superficially appear to be devoid of gendered context, when used as a ground

³²⁹ Agnes, *Family Law Volume 1*. Agnes notes,

Existing beliefs and assumptions shape the context of a legal provision. Even when changes are successfully made on a doctrinal level, they can and will fail if judges or others charged with application of new laws revert to interpretations that merely replicate old results..... Since legal, moral, and social codes are determined by hegemonic claims of patriarchy, an exploration into the notion of justice and fairness to women can be embarked upon only after piercing the veil of 'neutrality', 'impartiality', and formal equality within law. (At p. xxiii)

Sylvia Vatuk, "Where Will She Go? What Will She Do? Paternalism Towards Women in the Administration of Muslim Personal Law in Contemporary India," in *Religion and Personal Law in Secular India: A Call to Judgement*, ed. Gerald James Larson (Bloomington and Indiana Pollis: Indiana University Press, 2001), 226–48.

Vatuk draws attention towards implementation of Muslim Personal Laws in India. Criticising protectionist attitude towards women she mentions,

Those responsible for administering the personal laws tend to believe, as do most Indian, especially of the upper and middle classes, that the proper place for an adult woman is within a marital relationship. In order to "save" women by "saving" their marriages, lawyers, court-appointed social workers, and judges alike make ample use of delays, attempts at mediation, and pressures to reach a compromise. (At p. 228)

Vatuk further writes at another place

In the context of family court negotiations, women are regularly encouraged to drop criminal charges they may have filed against their husbands, to withdraw or reduce property, maintenance, or custody demands, and even to resume living with men who may have subjected them to long-standing abuse in the past. A legal discourse of "rights" is thus transformed into a discourse of "welfare", whose defining terms are set, not by the woman herself, but by her counsellor, her advocate, the judge, and, in the last analysis, by the realities imposed by the society within which she lives. (At p. 232)

³³⁰ Agnes, *Family Law Volume 1*, (At p. xxvi)

for divorce acquire a specific gendered meaning. The problem gets exaggerated in proceedings for maintenance, where economic claims are pitted against women's sexual morality.

An important engagement of feminist literature over the past decades has been to highlight role of the law in subordination and oppression of women.³³¹ Instead of law reforms and enforcement the focus has been on the ideological character of law,³³² on its active role in constituting and sustaining unequal power relations, and in suppressing cultural and religious differences amongst women. The idea that law is deeply embedded in society is explored by scholars by looking at the different forms of legalities and illegalities that are constitutive of the state law.

3.2.2.2 Law as a Culturally Embedded, Plural Entity

Challenging the trend of equating progressiveness with the idea of law as a homogenous, uniform force in the post-1990s phase there is increasing recognition

³³¹ Baxi, "Feminist Contributions to Sociology of Law," 2008. Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. *Subversive Sites* consists of one full chapter where one of the main concerns of scholars is to highlight how laws have been used to impose specific ideologies on women. See Chapter 4: Women, Hindu Right and Legal Discourse; the authors claim in the conclusion of this chapter,

the chapter has provided an example of the way in which legal discourse and equality rights are not necessarily progressive in nature. While the women's movement, and other progressive marginalized groups have deployed this discourse in pursuit of struggles for social change, we have seen in this chapter an example of groups with less progressive agendas similarly appropriating and deploying this discourse, (At p. 275)

For another such example see Sharmila Lodhia, "Legal Frankensteins and Monstrous Women: Judicial Narratives of 'Family in Crisis,'" *Economic and Political Weekly* 9, no. 2 (2009): 102–29. Lodhia provides an analysis of jurisprudence around section 498-A of the Indian Penal Code, a provision which makes cruelty, particularly dowry related cruelty, against women a punishable offence. She gives examples to show how implementation of Section 498-A is defeated by patriarchal inclinations of judges. For a strong critique of law as an entity implicated with ideology also see Haksar, *Demystification of Law for Women*.

³³² Trying to underline a distinct break from the earlier phase Kapur and Cossman mention,

In subversive sites, we focus our analysis on the legal regulation of women in and through the family. We do not provide an overview of the various family laws in India, or of the various legal provisions that continue to discriminate against women. Rather, we examine the legal regulation of women in the family as a site of women's oppression, of contradiction and of struggle.") Many studies have been done reviewing the laws that impact on women's status, and highlighting those laws that continue to discriminate against women. Our study moves beyond these reviews, and examines at a deeper level the contradictory ways in which the law is implicated in oppression of women. (At p. 12-13)

of the law as a plural entity.³³³ Uniformity and homogeneity which were once considered as characteristics associated with the ‘modern concept of law’ are now described as ‘traditional monotonous canvas of law’.³³⁴ Describing significant changes in feminist understandings of law, Baxi writes³³⁵

In recent years feminist understandings of law, be this through placing feminist theory within jurisprudence, through substantive areas of law or through specific campaigns authored by women’s movement in India, has challenged the idea of legal centralism.³³⁶ The challenge has been offered in different ways. First, the idea that state law itself is plural. Second, non-state law offers a challenging context to understand multiple forms and techniques of gender subjection. Third, not only does state law intersect with non-state law, but state law also mimes non-state law.

As Baxi points out, one of the concerns of feminist scholars in the recent times has been to deploy, ‘the notion of plurality to challenge the idea of a coherent,

³³³ Baxi, “Feminist Contributions to Sociology of Law,” 2008. Discussing about relationship of state law with different forms of local, customary practices relating to marital relationships, where a woman enters a form of partnership agreements with to live-together with a man in an intimate relationship, Baxi highlights three different conceptions of law. She states,

first, customary law is modern, in that it constantly re-invents itself by absorbing forms of formal law to circumvent existing legal regimes. Second, the regulation of sexuality cannot be understood within a doctrinal framework of law- state law is embodied in different forms of legal pluralisms- and it moves to contain its threats at some points of time, which tolerates pluralism at others. Third, sexual partnerships that are registered in an economy of trust under the shadow of law- which means that while such contracts cannot be used to deploy the force of the state, in case the promise is betrayed-the partnership becomes an event (and therefore a record) through the form of law. (At p. 83)

³³⁴ Agnes, *Family Law Volume 1.*, (At p. xxiv)

³³⁵ Baxi, “Feminist Contributions to Sociology of Law.”

³³⁶ One of the most influential scholars on legal pluralism is Griffiths, “What Is Legal Pluralism?” Quoting Griffiths Baxi describes legal centralism as,

Authority... centralized in the form of the state, represented through government, the most visible form of which is legislature....Law was conceived as gaining its authority from the state, and, as part of the process of government became authoritative. This authority, as its most basic level, was upheld through the power to impose or enforce sanctions. While associated with government, law was at the same time able to develop relative autonomy both from the state and from society through the existence of its own institutions, which dealt exclusively with legal matters... In this way law became established as a self-validating system, a system whose validity, authority and legitimacy rely no longer on external source such as morality or religion, but rather on internal sources which are self-referential for its regulation and perpetuation. (At p. 84)

homogenous and singular technique of harnessing legal authority'.³³⁷ Agnes challenges the understanding of distinction between state laws and non-state/community based laws as she mentions,³³⁸

The domains of formal state law and community-based non state law are not mutually exclusive. Though apparently in conflict, statutory law, which is deemed to be uniform and certain, but also formal and alien, coexists alongside pluralistic community practices, which are fluid and ridden with internal contradictions, but also accessible. Most women live with these contradictions in a sort of middle ground and negotiate their rights within both, the formal and alien court structures and the informal and accessible community practices.

Emphasising pluralistic nature of law Agnes further states,³³⁹

Life experiences do not neatly correspond to formal institutional locations and that the law gets constituted in a 'bottom up' manner as opposed to top down process of law making by legislators and judges.

3.2.2.3 New Understanding of the Concept of Personal Laws

Another important change which makes the current phase of scholarship markedly different from the previous phase is the changed understanding of the concept of personal laws, and of the relationship between religion and personal laws. Pioneer among family law scholars in India for advocating this new understanding, Agnes challenged the long-held belief that personal laws were based on divine revelation, as she notes,³⁴⁰

Despite the claim of divine revelation, religious laws, in effect, are people's laws which are moulded through community practices, which in turn are influenced by the prevailing socio-economic and political forces.

³³⁷ Baxi, "Feminist Contributions to Sociology of Law," 2008. (At p. 82)

³³⁸ Agnes, *Family Law Volume 1*. (At p. xxx)

³³⁹ *ibid.* At p. xxvii

³⁴⁰ *ibid.* At p. xxix

Agnes further deconstructs the colonial era belief about no role of human agency in religion-based laws as she mentions,³⁴¹

A popular misconception which shrouds the issue of ‘personal laws’ is that these laws are based on religious texts which lay a claim to ‘divine revelations’ and are hence, pre-ordained, infallible, sanctimonious, and static.

In contrast to the earlier streams where scholars were convinced that gender justice requires replacement of the religion-based pluralistic laws or customary practices, usually referred as traditional laws, scholars in the new phase are willing to accept co-existence of state law and non-state law as a sign of richness of Indian society. Agnes notes further,³⁴²

With its rich and diverse cultural heritage, religious beliefs and, customary practices, Indian provides a vast, complex, and at times contradictory, field of personal laws where the traditional coexists with the modern. State-enacted statutory law and court-evolved case law have reconciled with non-state ‘people’s law’.

Describing personal laws as rich mix of textual laws and community based practices she further views,³⁴³

It would be accurate to state that the diverse laws regulating family relationships are rooted either in customary practices or in interpretations of the divine law by scholars which were later modified through colonial interventions.

Highlighting importance of customs in pre-colonial Indian and challenging the tendency of reducing Hindu law to textual law or to a set of rules found written in scriptures Agnes further writes,³⁴⁴

³⁴¹ Also see Razia Patel, “Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice,” *Economic and Political Weekly* 44, no. 44 (October 31, 2009), <http://www.epw.in/journal/2009/44/review-womens-studies-review-issues-specials/indian-muslim-women-politics-muslim..> Deconstructing the practice of reducing Muslim law to set of rules based on ‘divine revelation’ Patel mentions, “Muslim personal law in India is not a divine book. It is rather a man-made law”. (At p. 45)

³⁴² Agnes, *Family Law Volume I*. (At p. 1)

³⁴³ *ibid.* (At p. 2)

To trace the antecedents of the non-state dispute resolution mechanisms within Hindu law, we need to examine the ancient Hindu *dharmashastras* (or the Brahminical *smriti* law), upon which the modern Hindu law of marriage and divorce is based. These scriptures do not contain legal principles in the strict sense that we understand the term today. The *smritis* preached *dharma*, denoting ethics, morality and good behaviour (*sadachara*). Custom was recognised as an important source of law. A custom which contravenes a *smriti* rule could be perfectly valid and could be given effect to, not only in informal dispute settlement processes but even in a formal court of law. The accepted legal maxim was that a clear proof of custom outweighs a written text..... Even the oft cited *Manusmriti*, which is projected as ‘divine code’ or as ‘Laws of Manu’ (akin to Law of Moses), is a compilation of ancient customs and usages.

She further draws attention towards plurality inherent in Hindu traditions, as she states that,³⁴⁵

Since the *smritis* were based on local customs, there was great diversity within them. Practices which were contradictory to each other could be termed as ‘Hindu traditions’.

3.2.2.4 New Understanding about Legal Developments in India: Family Laws Not Moving on the Linear Path of Progress

Taking a distinct break from the earlier streams contemporary scholars are willing to recognize that neither developments of family law nor the processes of attaining gender justice have followed a linear path of progress, from a continuum where one end is of customary laws and the other is that of neutral, secular laws.³⁴⁶ Challenging

³⁴⁴ *ibid.* At pp. 2-3. For diversity in context of Muslim personal laws also see Patel, “Indian Muslim Women, Politics of Muslim Personal.”. Discussing diversity in Muslim personal law Patel states, Muslims are often wrongly perceived as a homogeneous block of people with uniform religious laws governing them. However, it is very often ignored that Muslims worldwide have many different practices, and have a large number of variations in laws governing them within different Islamic countries and regions. (At p. 45)

³⁴⁵ Agnes, *Family Law Volume I*. (At p. 3)

³⁴⁶ For a similar challenge in the western context see Martha Minow, “Forming Underneath Everything That Grows: Towards a History of Family Law,” *Wisconsin Women’s Law Journal*, 1985, 819. Questioning use of such linear trajectory of progress to highlight development of family laws in USA Minow states,

the pre-1990s notion that transition from community based non-state laws to state laws is a sign of ensuring gender justice to women Agnes notes,³⁴⁷

The process of attaining gender justice has not been linear and both community laws and state laws continue to function from an inherent patriarchal bias against women.

Questioning the practice of projecting state enacted laws as pro-women she further states,³⁴⁸

There is also a tendency to project all customary laws as anti-women and state enactments or official laws as pro-women. Contrary to popular belief, the history of women's rights is not linear, with scriptural and customary laws forming one end of the scale and statutory reforms slowly and steadily progressing towards the other.

Questioning the idea of transferring control of family matters to the State, Agnes mentions,³⁴⁹

The claims of women from minority communities cannot be formulated merely within the narrow context of a progression from community control to state control and needs to be contextualised within the multiple hierarchies and complex negotiations between community, nation-state and the female subject, and the dynamics of contemporary majority-minority politics.

According to the traditional model, history follows a simple trajectory starting with female subordination in the family collectivity and ending with egalitarian individualism. This trajectory implicitly relies on an ideology of separate spheres as its initial starting point and an ideology of political autonomy as its destination. (At p. 869)

³⁴⁷ Agnes, *Family Law Volume 1*. (At p. xxx), Also see Parashar and Dhanda, *Redefining Family Law in India*.

³⁴⁸ For a similar view see Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Also see Rudolph and Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context." Taking cognizance of the fact that family laws have not been developing on a linear path of progress the authors state,

In India, the opposition between legal pluralism and legal uniformity is not likely to yield to a smooth progressive historical narrative in which society moves inexorably from first to second. Whether regarded as benign or malign, identity formation, in the form of religiously based personal law, seems to be alive and well. (At p. 56)

³⁴⁹ Agnes, *Family Law Volume 1*. (At p. xxxi)

3.3 New Concerns

3.3.1 Scholarly Attempts to Rethink the Relationship between Law, plurality and feminism

Having incorporated the above changes women's rights scholarship has undoubtedly undergone significant changes during the last three decades. Although some legal scholars are skeptical about the relevance of ideas like law as a site of oppression for India,³⁵⁰ it is clear that taking a break from the earlier phase where the law was central to women's struggle, even for the legal scholarship the law has now been displaced from the position of privilege. Law is no longer central to women's struggles since current scholarship embody the understanding that law is only one amongst many discourses, such as religious, moral and social discourses that influence and regulate society.

Scholars now suggest that women's movement to be organized with the understanding about the true nature of law.³⁵¹ Drawing on the revelations regarding law's connection with ideology, many legal scholars now direct feminists to break down the assumptions that 'law is the solution' and that it can provide 'definitive answers to the problems that women confront in their lives'.³⁵² Legal scholars now suggest to resort to law with 'appropriate expectations, with - the knowledge that law cannot alter the substantive realities of women's lives. With these trends, feminists are exposed to the requirement of broadening the scope of struggles and shifting focus from legal reforms. It is argued that feminists will have to stop measuring strategic engagements with law only in terms of a legal result- winning or losing a particular case or achieving desired legislative change. Suggesting new

³⁵⁰ Archana Parashar, "Essentialism or Pluralism: The Future of Legal Feminism," in *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India*, ed. Ratna Kapur (Delhi: Kali for Women, 1996), 36–60. Also Dhanda and Parashar, *Decolonisation of Legal Knowledge*; Parashar and Dhanda, *Redefining Family Law in India*.

³⁵¹ See Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Also, Amita Dhanda and Archana Parashar, *Engendering Law* (Lucknow: Eastern Book Co, 1999).

³⁵² Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 315)

ways to engage with the law with the awareness that the law can play a role in subordination of women, Kapur and Cossman state³⁵³

Legal discourse has constructed women as gendered subjects- it has constructed women as wives and mothers, as passive and weak, as subordinate and in need of protection. It is a discourse which has contributed to the subordinate position of women through its very construction of women's roles and identities. At the same time, law is a site where these roles and identities have been challenged. It is a site where social reformers and feminist activists have sought to displace previously dominant understanding of women's appropriate roles and identities, and sought to reconstruct women's roles and identities as more full and equal citizens. In place of an instrumentalist vision of law, we argue that law needs to be reconceptualized as a site of discursive struggle, where competing visions of the world, and of women's place therein, have been and continue to be fought out. We believe that such a reconceptualization of law can better capture both the possibilities and limitations of law, and law's contradictory nature in women's struggle for social change.

Kapur and Cossman further suggest,³⁵⁴

Law's role should be reconceptualized as including one of process. It may be a process of engaging with law- of litigation, of law reform, of legal literacy- that will offer the most to feminist struggles, and that may be able to most empower women. It is the process of engaging with law that may be able to best promote women's participation in decision-making. Instead of measuring strategic engagements with law only in terms of the legal result, winning or losing, law's role can be seen as, and measured against the extent to which it is successful in creating democratic space for women's participation in political, social, economic and cultural life.

³⁵³ Kapur and Cossman. (At p. 12) For reconceptualisation of relationship between law and feminism also see Eileen Fegan, "'Ideology' after 'Discourse': A Reconceptualization for Feminist Analyses of Law," *Journal of Law and Society* 23, no. 2 (1996): 173-97.

³⁵⁴ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 285)

There is also clarity that formal equality through the law is an ineffective tool for changing the status of women in society.³⁵⁵ Taking into account new insights about nature of law, current legal scholarship does not want law to be a neutral and autonomous force. Law is no more expected to be blind or indifferent towards a range of differences amongst women based on caste, class, religion, ethnicity etc. Aspiration of contemporary scholarship seems to be to re-conceptualize the relationship between law and feminism, so that the legal and judicial system can be sensitive towards a wide range of differences amongst women.³⁵⁶ Indicating significant change in approaches of the feminist legal scholars Parashar states,³⁵⁷

The central issue for legal feminism is: how is the insight that women are more likely to view themselves and others in relational terms rather than as autonomous individuals to be translated into law? The most common answer is that our legal concepts should recognize and value these qualities.

Feminist legal scholars advocate against pinning excessive hopes on legal reforms to bring social change and women's empowerment. Instead, law is now to be seen as a political force and a double edged weapon which can be used simultaneously for and

³⁵⁵ Kapur and Cossman. (At p. 13-14)

³⁵⁶ Jana Everett, "All the Women Were Hindu and All the Muslims Were Men," *Economic and Political Weekly* 36, no. 23 (2001): 2071-79. Emphasizing the necessity of taking into account differences between women, Everett notes,

Crafting of a multi-cultural women's movement, however difficult as it might be, is an imperative in order to counter effectively the manipulation by political elites. (At p. 2079)

Also Prabha Kotiswaran, "Book Review: Rumbings of a New Beginning: The Case of Feminist Legal Scholarship in India: Reviewed Book: Subversive Sites: Feminist Engagements with Law in India," *Harvard Human Rights Journal* 20 (1997): 341. Kotiswaran states

Feminist analysis in Indian context must address women's need to profess their religion, their ability to negotiate the structures that accompany such religious practice, and their capacity to appropriate opportunities for resisting ideology that discriminates against them.

Also Kapur, "The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India." Making a strong case for the efforts to protect diversity and differences Kapur mentions

The vast multitudes of deities co-exist with the vast multitude of people. You bump into them on the streets, trip over them on the sidewalk, they sit with you in taxis and attend street parades where they are the constant cause of traffic jams. Nothing could be more obvious and more a part of every day life than this fact of diversity. Yet today this very diversity is at risk, at peril. In the hands of the Hindu Right diversity is being re-fashioned as a weakness, as a fracturing of society, as a threat to the whole rather than what constitutes the whole. This is where the battle lies, in retrieving and revitalizing this value in cultures where the religious right is shaming people for their defects and differences, and where the assertion of difference is not merely about belief, it is about the very right to exist. (At p. 333)

³⁵⁷ Parashar, "Essentialism or Pluralism: The Future of Legal Feminism." (At p. 51).

against the interests of women.³⁵⁸ It is to be considered a process,³⁵⁹ a site for struggle where differences can be expressed and ‘contesting views of the world can be fought out’.³⁶⁰

While the earlier phase was about making efforts for grant of equal legal rights to women, scholars in the current phase problematize the notions of equality or sameness between men and women within marriage and implications of using a gender neutral term- ‘spouse’. Furthermore, while in the pre-1990s phase scholars perceived creation of a universal category ‘woman’ as an essential precondition for protection of rights of women, the concern in the current phase is to problematize the use of a generic term ‘women’, devoid of its specific socio-cultural context and location.³⁶¹ While previously there could not have been any question about the

³⁵⁸ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 39)

³⁵⁹ Baxi, “Feminist Contributions to Sociology of Law,” 2008.

³⁶⁰ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 12)

³⁶¹ Agnes, *Family Law Volume 1*. Agnes notes,

While using generic term ‘women’, it cannot be denied that there are many important differences amongst women. Since all women are not similarly situated, there is a need to contextualize the specificities of women belonging to marginalized communities. Since women’s oppression is not homogenous in content and since it is not determined by one root, underlying cause, there cannot be one ‘feminist method’, or ‘feminist epistemology’. (At p. xxvii)

Agnes notes further,

I find Chandra Mohanty’s critique of euro-centrism within western developmental discourses of modernity through the lens of racial, sexual, class based assumptions, useful. Mohanty points out that gender essentialism, i.e., over generalized claims about women, assumes that women have a coherent group identity within different cultures prior to their entry into social relations. Such generalizations are hegemonic in that they represent problems of privileged women who are often (though not exclusively) white, western, middle class. These generalizations, based on some abstract notion of strategic sisterhood, efface the problems, perspective and political concerns of women, marginalized because of class, race, religion, ethnicity, and/or sexual orientation. (At p. xxviii)

Also see, Rajan, *Real and Imagined Women..* Setting up a goal for feminists, Rajan writes,

One of the ways in which such a political appropriation may take place is by installing in the space vacated at the center (of history, society, politics) a resisting subject- one who will be capable of the agency and enabling selfhood of the ‘active’ earlier subject, while at the same time acknowledging the politics of difference. (At p. 10)

Also Maithreyi Krishnaraj, “Between Public and Private Morality,” *Economic and Political Weekly* 43, no. 17 (2008): 40–43. Advocating importance of taking into account ‘differences’ between women Krishnaraj argues,

Particularities can only flourish in the context of shared, broad based universalist democratic and socialist economic equality. The difficulty is how to recognize particularities without making it perpetual, closed and unchanging. To grapple with these contradictions feminists propose a middle ground- of differentiated universalism. The feminist slogan of personal is political implies that any issue can become subject of public debate. (At p. 43)

relevance of the western concept of human rights for India, in the current phase scholars want to question the relevance and desirability of applying the 'notion' of human rights within specific local context of the non-west.³⁶² Agnes makes a pertinent remark as she notes,³⁶³

Law-making cannot be a narrow and short-sighted venture at the instance of some pressure groups, acting upon certain international mandates of human rights. It carries very deep implications for a vast majority of people.

Further challenging the relevance of international human rights discourse for Indian context Agnes states,³⁶⁴

I argue against the demand for universal application of human rights as articulated by international women's groups from the West (and endorsed by some women's groups and feminist scholars in India) in favour of a more nuanced and culture specific theory of women's rights.

Emphasizing the necessity for developing a new version of feminism which can be sensitive to the specific local demands Agnes further mentions,³⁶⁵

Yet another author, Prabha Kotiswaran suggests that feminists can

Draw from each other's experiences in a manner that recognizes Third World differences without treated Third World women as a homogenous category or long-suffering victims of patriarchy. (At p. 6)

Kotiswaran, "Book Review: Rumblings of a New Beginning: The Case of Feminist Legal Scholarship in India: Reviewed Book: Subversive Sites: Feminist Engagements with Law in India."

³⁶² Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics," *Harvard Human Rights Journal* 15, no. 1 (2002): 1-38; Kapur argues that feminist politics and international human rights discourse have created women in the image of 'victimized subject'. Agnes, *Family Law Volume 1*. (At p. xxv)

³⁶³ Agnes, *Family Law Volume 1*. (At p. xxviii)

³⁶⁴ *ibid.* At p. xviii

³⁶⁵ *ibid.* (At p. xxviii) Also Rajan, *The Scandal of the State*. Aiming to use rights discourse for the cause of women's rights Rajan states

The discovery and disappointment about the necessary-but-insufficient scope of rights has led to two different kinds of feminist developments: either a complete turning away from (further) rights rhetoric and struggles or an attempt to identify the precise limits of rights, rectify shortcomings, and seek to work towards substantial equality. The first is a radical repudiation, the latter a liberal reformist response. Few things, however, are sufficient in themselves, and the expectation that rights would be all-powerful, cancelling at one stroke the inequities of history, is also at one level a recognition of the enormous cost of not having political rights or citizenship in the world today. (At p. 18)

Contemporary feminist discourse needs to be far more nuanced... Rather than blindly advocating a ‘universally’ accepted position framed by a first world feminist discourse, women’s rights groups need to advance a position which is rooted within Third world realities. A feminist voice must lend credence to the claims of the weaker against the might of the status quo-ists institutional authorities.

While the changed expectations from law is an important change, the most significant change of recent years undoubtedly is in the domain of family law, given the fact that demand for a uniform civil code as the solution for ensuring empowerment to women in family is now on the backtrack.

3.3.2 Rethinking the Relevance of the Uniform Civil Code for the Cause of Women’s Rights

Although uniform civil code debate continues to be a hotly debated subject in India,³⁶⁶ there has emerged a stream of legal feminists who no longer consider it to be a solution to the problem of gender inequality in the domain of family.³⁶⁷ Transferring complete control of family matters to the State, especially in matters relating to formation and dissolution of marital relationships, are no longer perceived as desirable measures for women’s empowerment by an increasing number of women’s rights scholars.³⁶⁸ Expressing doubt about the utility of the

³⁶⁶ *Supra* fn. 8

³⁶⁷ Some of the important works which question the relevance of the UCC are: Agnes, *Law and Gender Inequality*. Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*.; Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Menon, “It Isn’t about Women.”

³⁶⁸ Many recent works do not consider monogamy or homogenised forms of marriage as signs of progress. Some prominent examples are: Agnes, *Family Law II*, 2011.; Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*.; Emphasis on imposition of monogamy, homogenised single forms of family, and formal relationships as the only form of valid marital relationships are now depicted by Madhu Mehra as The ways in which law privileges men’s control and ownership of women and property, as also it does upper-caste forms of sexual control of woman through privileging monogamy, while stigmatizing non-monogamy, popularly perceived as a lower-caste practice. (At p. 16)

Also see, Choudhury, “Between Tradition and Progress: A Comparative Perspective on Polygamy in United States and India.”

Apart from questioning valorisation of monogamy, feminist scholars in recent years have also expressed doubt about the importance of individualistic property rights to women. See Menon, “Uniform Civil Code – the Women’s Movement Perspective,” October 1, 2014. Emphasising requirement of rethinking in the women’s movement Menon noted,

uniform civil code for rights of women, especially for women belonging to minority denominations, Agnes notes,³⁶⁹

The demand for a UCC places gender as a neutral terrain, distanced from contemporary political processes. The demand projects minority women as lacking a voice and an agency either in their own communities or through the process of litigation, to claim their rights within existing structures. It projects legislative intervention in the form of an enactment of a uniform code as the only option to attain gender justice for minority women.

Highlighting the importance of diversity in family forms another author notes,³⁷⁰

The diversity is not an outcome of random choice or ignorance, and cannot simply be homogenised by the enactment of law.

The question of women's equal rights to property may need to be reformulated radically at this stage of the UCC debate. I suggest that the Personal Laws on succession and property represent a point of conflict between the imperatives of the State and those of the Family. The modern state requires legibility in order to mobilize resources towards capitalist industrialization, that is, it must be able to 'see' and organize different forms of property in existence, especially land. Towards this end, the institution of individual rights to property is crucial. All forms of property must become completely alienable and transparent to the state – this development is essential for capitalist transformation of the economy.

The family on the other hand, has its own imperatives of controlling name, descent and passing on of property, a project disrupted by individual property rights. In the light of this, we must view the state's gradual granting of property rights to women under Hindu law – the most recent amendment in 2005 giving women rights to ancestral property as well – as more than a simple triumph of feminist demands. It also represents the establishment of a bourgeois regime of property for the Hindu community at least in principle, which makes land completely alienable by every separate individual owner. In the current climate of widespread resistance to land acquisition by the state, this is a considerable achievement for the state, as it is always easier to pressurize or tempt individual owners rather than communities, to sell land.

It is in this context that we must understand feminist legal scholar and activist Nandita Haksar's critique of some feminist initiatives to press for individual rights to property for tribal women over community rights. She urges the need for a struggle within tribal communities to evolve new customs that are more egalitarian, rather than forcefully introducing from above, individual rights to property. Feminist land rights activists have also become cautious about focusing on joint titling of family plots while losing sight of the state's encroachment on commons and public lands. Common property, they realize, is the biggest impediment to market relations, and they would rather work for collective ownership of the commons, rather than for 'women's rights to land' – this would necessarily be a political, anti-state struggle, allied to other livelihood movements, and would not be a women's struggle but a community movement.

Should the larger question of land rights and land acquisition by the state be set aside while discussing individual women's rights to property? Clearly, the feminist debate over the UCC has reached a new stage of complexity, and conversations have begun afresh.

³⁶⁹ Agnes, *Family Law Volume 1*. (At pp. xxvi-vii)

³⁷⁰ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. (At p. 15)

It is true that one of the reasons for giving up the demand of uniform civil code is the apprehension amongst scholars that this issue was being mis-appropriated by the conservative and orthodox political forces.³⁷¹ Apart from this, scholars' change in stance is based on the realization that the promulgation of uniform, gender-neutral laws and imposition of monogamy has neither resulted in eradication of influence of religion and traditions from people's lives nor has it necessarily resulted in empowerment of women.³⁷² There is an increasing realization that attempts to use the instrument of law to eradicate customary practices like bigamy or different forms of establishing intimate relationships has not been favourable to women.³⁷³

³⁷¹ Agnes, *Law and Gender Inequality*; Choudhury, "(Mis)Appropriated Liberty."; Menon, "Uniform Civil Code – the Women's Movement Perspective," October 1, 2014. ; Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press, 2003); Mullally, "Feminism and Multicultural Dilemmas in India," 2004.; Kapur, "The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India." Expressing concern over what is labelled as Hindu Right Kapur states,

Religious fundamentalism is often presented as a characteristic or feature of 'other' countries, 'other' worlds, and most frequently of course, the Islamic world and the Muslim community. The Taliban is frequently invoked to justify this claim. But the Taliban did not come into power through popular consent and democratic process—it used brute force. Today, my concern has been with what I perceive to be the more insidious, indeed more alarming development in our respective worlds—the seepage of the ideology of the religious right in and through democratic institutions and liberal rights discourse. (At p. 332)

³⁷² Referring to a secular legislation the Special Marriage Act Agnes mentions,

The civil law of marriage provides an optional secular code for all Indians and is a step towards uniformity and secularization of laws of marriage and divorce. But it has failed to make a dent within community-based customary practices. (At p. 111)

Agnes, *Family Law Volume 1*. Agnes mentions at another place,

We also need to acknowledge that despite codification, a large segment of the Hindu (this applies to other communities as well) population lives and manages its affairs outside the pale of state laws and regulations. In fact, a Hindu need never interact with state authorities, neither for solemnization of marriage nor for its dissolution, as these can be carried out through customary practices with the non-state mediation fora. It is within this sphere that the rights of poor and marginalized women to whom the formal court structures seem too distant and alien, are constantly contested and negotiated. (At p. 2)

³⁷³ See Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Based on PLD's field work in rural and semi-urban contexts in some states like Orissa, Uttar Pradesh, Rajasthan and Kerala Mehra notes,

The case work undertaken as a part of crisis intervention consistently revealed the limitations of legal support available to women in relationships other than valid marriages. For instance, women in bigamous marriages, those who were long-term partners, common-law wives, and those in premarital relationships founded on the promise of marriage fell outside the ambit of legal support. The claims of such women to financial support, shelter and maintenance upon 'desertion' have no place in law.

.....

Contemporary scholars are gradually willing to question the feasibility and desirability of transferring complete control of family matters to the State.³⁷⁴ There is also an increasing, albeit reluctant, realization that total state control, for example in the form of compulsory registration of marriages, is neither going to work effectively nor is it going to be favourable to women, necessarily.³⁷⁵ Notably, current scholarship rejects the idea of imposing a single form of family through uniform laws, as a means for protecting rights of women or for ensuring them equality with men in personal relationships.

In contrast to the earlier phase, in recent years, one of the important expectations of women's rights scholarship has been that the state and its legal system should allow men and women freedom to organise personal relationships either according to their religion and customs or according to their choice.³⁷⁶ Contemporary scholars and activists somehow expect law to protect the rights of those women who choose to be a party to a range of formal and informal ways of organising adult intimacy. Human rights framework which was expected to be indifferent or even intolerant towards

We believe that legal regulation could be instrumental in facilitating social justice within the family, but only if it could challenge norms that establish the systems of control over women, women's labour, and women's reproduction and sexuality- *for all women in intimate relationships and for all families constituted by such relationships*. (emphasis added) (At p.17)

Agnes, *Family Law Volume 1*. Questioning relevance of the anti-bigamy laws for rights of women Agnes states,

The question of muslim polygamy also needs to be examined in the context of Hindu polygamy and the implications of imposing monogamy through the enactment of Hindu Marriage Act, 1955. Women in culturally accepted polygamous or marriage like relationships are denied their rights to maintenance due to these hegemonic claims. (At p. xxviii)

³⁷⁴ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Not finding any direct connection between homogenised family laws and rights of women Madhu Mehra states,

Whether our role as advocates, activists, and fieldworkers is to expand gender justice and to seek legitimate entitlements for women at margins, or whether it is to promote legality, its norms, and a homogenised form prescribed by law. (At p. 13)

³⁷⁵ Agnes, *Family Law Volume 1*. Raising doubts about utility of compulsory registration of marriages Agnes states,

The demand for compulsory registration of marriage and for declaring all unregistered marriages as void needs to be examined in the context of increasing state control and raises a concern whether such control will be beneficial to women or, on the contrary serve to defeat their existing rights. (At p. xxviii)

³⁷⁶ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.; Agnes, *Family Law II*, 2011.

cultural and legal pluralism, is expected to be cognizant of diversity. Expressing her concern for diversity of family forms, Madhu Mehra writes,³⁷⁷

A human rights framework requires us to recognize the diversity of family forms and to ensure that gender justice is achieved in all those contexts, rather than being limited to one ‘formally’ recognized context alone.

Also, considering uniform civil code as a majoritarian Hindu agenda, a dominant concern of scholars is to devise a process of reform within personal laws to protect women from internal patriarchies.³⁷⁸ Doubting the value of UCC for the cause of women’s rights Agnes states,³⁷⁹

While examining the demand for a uniform set of family laws applicable to all communities, a question that needs to be interrogated is whether the term ‘women’ is a universal category, devoid of specific socio-cultural contexts and locations and whether personal laws can be examined ahistorically, stripped of their colonial and post-colonial groundings?

Questioning the idea of complete state control on family matters as essential for gender justice Agnes further states,³⁸⁰

The claims of women from minority community cannot be formulated merely within the narrow context of a progression from community control to state control and needs to be contextualized within the multiple hierarchies and complex negotiations between community, nation-state and the female subject, and the dynamics of contemporary majority-minority politics.

Uniform Civil Code, the scholars in this new phase argue, is a project which situates minority women in antagonistic relationship against their own communities.³⁸¹

³⁷⁷ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*. (At p. 14)

³⁷⁸ Parashar and Dhanda, *Redefining Family Law in India*. Highlighting main concern of their work Parashar and Dhanda state,

We aim to move beyond the impasse of debates about religion versus state and majority versus minority. (At p. x)

³⁷⁹ Agnes, *Family Law Volume 1*. (At p. xxvi)

³⁸⁰ *ibid.* At p. xxvii

³⁸¹ Menon, “Uniform Civil Code – the Women’s Movement Perspective,” October 1, 2014. Reflecting skepticism towards utility of Uniform Civil Code for minority women Menon notes,

3.4 Emerging Changes in Women's Rights Scholarship in India: A Bane or Boon?

3.4.1 Emerging Changes and Divergence in Feminist Legal Scholars' Views

Having incorporated all the above changes women's rights scholarship, undoubtedly, has made significant advances over the earlier streams wherein scholars reposed complete faith in potential of the State and its legal system for effecting 'fundamental transformation' in Indian society. While changed approach towards law is now one of the central features for contemporary women's rights scholarship it took sometime before legal scholars in India could openly declare their estrangement with law.³⁸² Convinced that transition from tradition to modernity is essential to bring about any improvement in the situation of women, scholars have been raising doubts about relevance of the new streams of legal studies for Indian society. While modernity and modern law were seen as mythical in the western academics, particularly by feminist scholarship,³⁸³ some scholars in India argued for

The women's movement supports initiatives within communities to bring about reforms, so that the rights of women do not become a casualty to the fear of minority communities that reform of personal laws is only a pretext for eroding their identity in this sharply polarised polity. It is not a paradox that some Islamic states have managed to reform laws in the interests of women. When a minority community is threatened with annihilation, the obvious response is to close ranks. It is when a community is confident that it can afford to be self-critical. What the women's movement demands is the bringing about of gender justice within both religious and secular laws.

³⁸² For a forceful questioning of the relevance of new streams for Indian discourses see Parashar, "Essentialism or Pluralism: The Future of Legal Feminism." Also, Parashar and Dhanda, *Redefining Family Law in India*.; Dhanda and Parashar, *Decolonisation of Legal Knowledge*.; Dhanda and Parashar, *Engendering Law*; Archana Parashar, "Religious Personal Laws as Non-State Laws: Implications for Gender Justice," *Journal of Legal Pluralism* 45, no. 1 (2013): 5–23. In her recent writing of 2013 Parashar finds the 'legal pluralism discourse' which aims to extend support to customary laws as highly problematic.

³⁸³ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (USA: Harvard University Press, 1987), Mackinnon is a pioneer scholar in the western context pioneers in questioning the idea of law as instrument of social change. For a detailed discussion on this issue see Scales, "The Emergence of Feminist Jurisprudence." While feminist scholars, including feminist legal scholars, have embraced insights of the critical theory which challenge role of the State and modern law in empowerment of women, there have been concerns in the Western writings too about the effects of such challenges, especially that of post-modernism on legal feminism. See Fegan, "'Ideology' after 'Discourse.'" Drawing attention towards challenges faced by feminism Fegan writes,

Of many challenges faced by feminist legal scholarship in recent years, the post-modernist challenge to the use of overarching theoretical frameworks to 'explain' women's position under law has been characterised as one of the most 'destabilizing'. Theories derived from the analytical concept 'ideology', and advocating 'consciousness raising' as the means of redressing women's inequality under law have been the subject of most frequent criticism due (in part) to their reliance upon unsustainable essentialist notions of truth and femininity. Yet, increasingly

the necessity of maintaining that myth for a society like India which, according to these scholars, was in grip of traditions and religion.³⁸⁴ Perceiving the realm of traditional understanding of law as undesirable particularly from point of view of women's rights, these scholars cautioned against questioning the role of the law and the state in pushing India on the path of progress.

For example one of the leading family law scholars, Archana Parashar considered that situation in India was not yet ripe for any scepticism against the state and its legal order.³⁸⁵ She argued that the newly emerging Western trends in legal feminism were not only irrelevant but can also be potentially damaging for Indian context. According to Parashar,³⁸⁶

If all that legal feminism does is to identify law as an exercise of power, and therefore of not much use to the majority of women, then legal feminism cannot fulfil its potential as a social movement. In fact this would be an inexcusable use of the label of feminism by legal academics to secure private academic career paths.

Taking note of the feminist works, which have 'expressed great doubt about the desirability of gender equality as a feminist goal as well as the capacity of the law reform to achieve this goal' Parashar cautioned 'against applying these theories to the Indian situation'.³⁸⁷ In her view, feminist writers challenging the 'efficacy of law

'discourse', the post-modern successor to ideology, has come under attack from feminists concerned with maintaining a reformist stance towards law. (At p. 173)

³⁸⁴ Ram Puniyani, "A Doll's House," *Economic and Political Weekly* 39, no. 46-47 (2004): 4974-75. Naming post-modernists who appear to be defending traditional community practices as sophists Puniyani makes a case in favour of modernity as he states,

Modernity, essentially, has to be an ensemble of concepts where equality amongst citizens, irrespective of caste, gender and religious identity, is a non-negotiable concept. (At p. 4975)

³⁸⁵ Archana Parashar, "Essentialism or Pluralism: The Future of Legal Feminism," *Canadian Journal of Women and the Law* 6 (1993): 328-48

³⁸⁶ Parashar, "Essentialism or Pluralism: The Future of Legal Feminism." (At p. 36)

³⁸⁷ *ibid.* Challenging relevance of new trends in feminist legal theory in the West, Parashar argues Carol Smart advises us to decentre law, and Catherine Mackinnon says law is male, with the implication that we should abandon it. How can such analyses explore the potential of law to change itself or society or to explore the ways in which law reform can be meaningful project for the benefit of all "other" women? Admittedly these are not the priorities of white affluent feminists and they should not be expected to waste their time on the problem of others. But then have they not lost the claim of legitimacy to talk about "women" and the law? Instead of talking

as an instrument of social change’ ‘come from very different societies’,³⁸⁸ the societies which had long ago taken the evolutionary leap to emerge as societies divested of the authorities of religion, tradition or custom. Parashar asserted that the western feminists’ concern shifted beyond law reform and legal rights only after they had virtually achieved legal equality with men after the laws incorporating formal equality had been successful in establishing equal moral worth of women in western societies.³⁸⁹ She emphasised that notwithstanding its limitations, it is the state and its legal order which has made it possible for western women ‘to focus on alternative strategies for ending the oppression of women’.³⁹⁰ Emphasising direct relation between religion/tradition and discrimination against women Parashar implied that in the West it is the freedom and empowerment gained by women through uniform, secular family (civil) codes and consequent allocation of same legal entitlements as men that permits western feminists to question role of the state in the sphere of family, to argue against homogeneity and uniformity in law and to demand freedom to organise personal relationships in diverse forms.

about feminist jurisprudence these writers should be talking about first world feminist jurisprudence. (At p. 48)

³⁸⁸ *ibid.* (At p. 50)

³⁸⁹ *ibid.* Finding new trends in the feminist scholarship problematic Parashar accuses western feminists of insensitivity towards traditions. Labeling the western feminists as ‘white, middle class, fairly mainstream’, those living in ‘secularised polities’ of the First world, Parashar argues that western feminists are insensitivity towards the concerns of third world women. She further argues that the western feminists have failed to take into account ‘intersection of law and religion in oppression of third world women’. She suggests that western feminists should realise that being far behind the advanced western countries third world women have not yet come to acquire the same concerns about women’s oppression as the western feminists have. She argues

Catherine Mackinnon identifies sexual objectification as the most important aspect of women’s oppression. It follows that the appropriate objective of the legal feminism is to prevent sexual objectification. However, for an African woman or any other third world woman, sexual objectification is almost irrelevant. Much more important is whether she can protect herself against physical abuse, save herself from being burnt alive for bringing inadequate dowry, prevent herself from being turned out of her house with nowhere to go and no social security system to fall upon, or to avoid starvation for herself and for her children. (At p. 46)

Parashar further notes,

the legal feminists’ enthusiasm for semantic deconstruction cannot be of much solace to battered wives or single mothers living in poverty’. (...) The same can be said for Western legal feminism’s concern with sexual objectification and sexual harassment. These can hardly be concerns of women who have no opportunities for economic or psychological independence. Likewise sexual harassment has little relevance for women who cannot even hope for steady wage employment. (At p. 47)

³⁹⁰ *ibid.*

Defending an important role of the state and its legal machinery in women's emancipation she argued that increasing focus in feminist scholarship on the oppressive nature of modern law and on the ineffectiveness of formal equality undermines the much-required efforts for exploiting potential of law in improving women's situation in India. Parashar argued that the feminists analysis that have emerged in the West concerning patriarchal nature of state and its law do not outweigh the imminent necessity of law's involvement in seeking liberation of women from the constraints of religion, tradition, caste, custom or community. In her view, like western women, Indian women too need to struggle to ensure that family relations are regulated uniformly by the state in order to arrive at a position from where interference of the state can be challenged and sidelined.³⁹¹ For Parashar taming traditional 'chaos' of extremely heterogeneous customary and religious forms of organising family (personal) relations through a set of uniform and general family law rules is a pre-requisite to empower women and to establish their equal moral worth in the society. Her assertion was that much of the disillusionment with the efficacy of law is a result of 'inappropriate expectations' about its potential to bring about women's emancipation. She contended that feminist should remain aware that 'by itself legal equality would not be sufficient to transform the present unequal relations between men and women and make all social relations absolutely uniform'.³⁹² Stressing on the symbolic role that law can play in inducing social change Parashar argued that instead of unrealistically expecting that law can change the whole social system, it would have been more productive to realise that the State and its political and legal institutions can be instrumental in mobilising forces to lead Indian society towards fundamental transformation.³⁹³

3.4.2 Increasing Scholarly disillusionment with the State and its Legal System: From Scepticism to Acceptance

Whatever may be the skepticism of some legal scholars about relevance of the new ideas like law as a site of oppression for India, it is no longer possible to overlook the insights highlighting the 'myth of modernity' and deconstructing the idea of

³⁹¹ Parashar, "Religious Personal Laws as Non-State Laws: Implications for Gender Justice."

³⁹² Parashar, *Women and Family Law Reform in India*. (At p. 26)

³⁹³ *ibid.* At p. 28

modern law as a rational, autonomous and objective force.³⁹⁴ At a global level it is now a well-accepted fact that the colonial rule had detrimental influence on non-western societies. The efforts for a changed relationship between law, traditions and rights is now a widely accepted phenomena in all parts of the world. Whether it is feminist scholars or the rights scholars in general, nobody questions the ideas that evolutionary theory of progress gave rise to ill-conceived binary oppositions such as tradition v modernity or east v west and that the law and the rights discourse have been means for curbing cultural and religion based differences and for perpetuation of colonial hegemony on non-western societies. Even the skeptics have agreed to the fact that law must be sensitive to differences based on religion, sex, caste, ethnicity or sexual orientation.³⁹⁵

Moreover, in the last few decades, the above-mentioned scepticism has gradually given way to acceptance and accommodation of new understandings about the law and the state with emergence of pioneering works like that of Kapur and Cossman³⁹⁶ who suggested ways to deal with deconstruction of law in Indian context.³⁹⁷ Such

³⁹⁴ While this faith in law persisted for a long time, the post-colonial scholarship points towards the tendencies for Occidental hegemony involved in this projection of law as omnipotent. See Fitzpatrick, *The Mythology of Modern Law*. Fitzpatrick points out

Along with generality of its sanctioning force, law demands ‘that all sectors of society abandon their autonomy of legal interpretation (that is, the extent of their obligation) in favour of a single interpretative authority’. Thus we have replicated in law the ‘Christian axiom that custom, history, tradition, were to be conquered in their effectiveness by the word- and the law’. ... What is more modern law could re-shape the conquered could release norm-contents from the dogmatism of mere tradition and.... determine them intentionally. ... The legal subject emerges out of this paradoxical privatism not only as the abstract bearer of legal rights and duties but also, as the possessor of a specific Occidental identity not unlike that possessed by the subject of the Christian god. (At p. 57)

³⁹⁵ For example see Parashar, “Essentialism or Pluralism: The Future of Legal Feminism.” A most vehement critique of the new trend in feminist scholarship does not want to seen as someone who is not sensitive towards traditions.

³⁹⁶ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*.

³⁹⁷ A precursor to this accommodation by the Indian legal scholars can be seen in the works like Jackson, “Contradictions and Coherence in Feminist Responses to Law.” Pointing out the challenges faced by feminists and the legal reformers due to the postmodern challenge to universalism Jackson states,

As feminism in the 1990s begin to deconstruct women’s experiences and find that there is not a single category of women sharing identical experiences as a result of their gender, the use of law seems more problematic. If feminists proclaim that theirs is a fractured narrative, lacking coherence and rationality, it may be easier for the legal establishment to ignore its responsibility for social change. Finding a perplexing degree of diversity among women is not a reason to call into question the point of feminism. Still less it is a reason to abdicate from a legal arena in which this fractured narrative can too easily be denounced as insufficiently abstract and

authors were neither sceptical of the new trends in legal feminism nor did they perceive revelations regarding the oppressive nature of law as a reason for 'relinquishing law'. Attempting to establish importance of law, these authors argued that legal discourse is useful for feminist struggles, since not only it enjoys the position of 'particularly authoritative discourse in society', but also for the fact, that,

Relinquishing the terrain of law would be to surrender a powerful site in discursive struggles for ideological hegemony...relinquishing law would be to leave the terrain to communalist and other patriarchal forces.³⁹⁸

Moreover, recent changes in socio-legal discourses can be considered important given the fact that it is for the first time that women's rights scholars appear inclined not only to acknowledge but also to take responsibility of the fact that women's movements have not been able to make difference in the lives of millions of common women in India.³⁹⁹ The cause of women's rights in India has suffered due to scholarly ill-founded conviction that India is following the path of progress which is presumed to have been followed by the West.

After nearly two hundred years of colonial rule and nearly sixty years after independence, the Indian legal system does contain many laws which, as scholars and activists believed, should have taken India or at least Hindus in the country towards modernity. In other words, the Indian society should have acquired the situation: where an individual, and not the family or community is seen as a basic unit in society; where marriage as perceived as a contract and not a sacrament; and

coherent. Instead, it is very nature of this legal establishment which should be questioned. The rules of the theory game are not neutral, and feminism has an important role to play in exposing their partiality. Moreover, feminism which is more subtle as a result of including contradictory and inconsistent accounts of women's lives has, I believe, an even greater transformative potential. (At p. 399-400)

For similar views also see Kapur, *Erotic Justice*.

³⁹⁸ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (Ay p. 285) Also Ratna Kapur, "Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India," *Columbia Journal of Gender and Law* 10 (2001): 333-84.

³⁹⁹ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. The authors state,

Despite the legal victories over the years, the social, political and economic status of women has shown remarkably little improvement. There is extensive evidence of the startling amount of sexual and physical violence against women- rape, dowry and domestic violence persist in the face of legislation designed to eliminate these practices. (At p. 20)

where all aspects of individual and community life are governed only by a uniform set of laws made by the state. However, it is a fact that despite a modernized legal system and modernization of Hindu family laws, traditional social order and traditional values- such as viewing marriage as sacrament and the family as basic and sacred unit is society- have refused to yield. Notwithstanding numerous legislative victories which seem to be pushing India towards modernity and effecting a transition from ‘dharma to law’, the transition towards modernity has remained incomplete. Despite incessant efforts of scholars and activists it has not been possible to move to a stage where it can be shown that India has a legal system based on a strict separation between the law and religion. Although the socio-legal scholarship in India supports the belief that the Constitution of India envisages a society having an individual as a basic unit, family and community continue to be the central organising units of society in India.⁴⁰⁰ Moreover, society as well as the judiciary of the country continues to reinforce the traditional idea of marriage as a sacrament⁴⁰¹ in spite of the scholarly perception that the legislative reforms which granted the right to divorce to women were meant to replace notion of marriage as a sacrament with the idea of marriage as contract.⁴⁰²

Given the above state of affairs it is a highly significant change that scholars and activists, especially legal scholars, are now willing to deal with law with an acknowledgement and appreciation of the fact of close connection between law and culture or law and society.⁴⁰³ It is an important development that scholars are

⁴⁰⁰ The Family Courts Act, 1984, The Act aims to promote conciliation in disputes relating to family matters.

⁴⁰¹ *Amardeep Singh v Harveen Kaur*, No. C.A. No. 11158 of 2017 (Supreme Court September 12, 2017).

⁴⁰² Werner Menski, “The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda,” *German Law Journal* 9 (2008): 211–50. Taking note of developments in Indian family law Menski convincingly argues

India today increasingly turns its back on supposedly European or “Western” models, and has been developing its own country-specific and situation sensitive methods of handling complex socio-legal issues. (At p. 211)

⁴⁰³ For a detailed discussion to establish the fact that connection between law and culture/law and religion/law and traditions is a ‘universal phenomenon’ and not merely a non-western phenomenon see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Japan: Tokai University Press, 1989); Adda B. Bozeman, *The Future of Law in a Multicultural World* (New Jersey: Princeton

inclined to take cognizance of the fact that it has not been possible to reorganize the Indian society around tenets of rights, legalism and individualism, the tenets which are central to human rights discourse and are presumed to be central to society in the West.⁴⁰⁴ It is an important development that scholars are willing to reject the ‘gap theory’ which has been the dominant way to explain the situation of gap between law in action and law in books.⁴⁰⁵ Scholars have also begun to question their practice of equating progressiveness with uniformity in law. For the first time there is a realisation amongst the ‘legal actors’, especially those concerned with rights of women, that the cause of women’s rights in India requires new and indigenous versions of women’s movement- versions where law is required to be neither neutral towards differences, nor it is to be an instrument for eradication of cultural and religion based differences.⁴⁰⁶ Instead the law is now expected to be sensitive to differences based on caste, class, religion, culture or ethnicity.⁴⁰⁷

Recent changes in the socio-legal discourses are also important for bringing to the forefront certain important elements about non-western traditions which remained obscured for many decades. For example, it is really important for the cause of women’s rights in India that scholars are willing to challenge the colonial era

University Press, 1971). On the concept of legal culture see Mark Van Hoecke and Mark Warrington, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law,” *The International and Comparative Law Quarterly* 47, no. 3 (1998): 495–536; Roger Cotterrell, “The Concept of Legal Culture,” in *Comparing Legal Cultures*, ed. David Nelken (Dartmouth, 1997), 13–31; Martin Krygier, “Law as Tradition,” *Law and Philosophy* 5, no. 2 (1986): 237–62. Also see Griffiths, “What Is Legal Pluralism?”

⁴⁰⁴ A prominent example of this approach is: Agnes, *Family Law Volume I*.

⁴⁰⁵ Rajeev Dhavan, “Introduction,” in *Law and Society in Modern India*, by Marc Galanter (Delhi: Oxford University Press, 1989), xiii–c. (At p. xxiii). While for feminist scholars rejection of gap theory may be result of increasing influence of critical theory, some analysts of Indian legal system like Dhavan have also criticised this theory. Rejecting the ‘gap theory for continuing disparity between law in action and law in books Dhavan opines,

‘Gap’ theory is a political ploy to persuade the disadvantaged that the programmes which were designed for their benefit had, somehow, accidentally, rather than deliberately, misfired. ‘Gaps’ are created by powerful forces in society. (At p. xxiii)

Also *supra fn.* 272.

⁴⁰⁶ Chiba, *Legal Pluralism*. Arguing against the deployment of binary of tradition v modernity to make sense of non-western traditions Chiba writes,

The prevailing characterisation of the non-Western law and society as ‘traditional’ in contrast to the Western as ‘modern’ is too simple a labelling to afford correct understanding of the non-Western situation. (At p. 6)

⁴⁰⁷ Chaudhuri, *Feminism in India*. Also see, Ghosh, “Feminism in India.”

practice of reducing family laws of different communities to a set of texts presumed to be based on divine revelation.⁴⁰⁸ Questioning the colonial era practice of equating *dharma* with law is a significant step taken by the prominent family law scholars like Agnes.⁴⁰⁹ It is also a welcome change that scholars are willing to take notice of the distortions created by colonial rule by equating scriptures to legal norms.⁴¹⁰ Drawing upon streams like post-structuralism, the new streams makes it possible to raise doubts on the colonial descriptions of non-western cultures and to put forward the contentions that colonial rulers constructed these cultures in negation as a means to perpetuate European domination. Among new streams of work, most significant are those which draw attention towards diversity of family and marriage forms in pre-colonial India and explain how colonial rule was a cause of curtailing legal diversity.⁴¹¹ Diversity of family forms is a historical fact in India, which has survived the onslaught of colonial rule. Protecting rights of women in wide range of formal and informal relationships particularly those which came be declared as void and illegal in wake of modernisation has been a matter of concern for Indian legal system, particularly for Indian judges, since a long time.⁴¹² For protecting rights of women in pluralistic relationships it is an imminent requirement that legal scholars take cognizance of plurality of Hindu law or Muslim law or other religion based laws and customs to protect women in pluralistic relations.⁴¹³ For the cause of women's rights in family it is also important that scholars make efforts to devise some kind of legal framework to deal with the rights of women in different kinds of formal and informal relationships.

⁴⁰⁸ Two prominent works by Flavia Agnes which challenge some of the established notions which dominated family law scholarship are: Agnes, *Family Law II*, 2011; Agnes, *Family Law Volume I*.

⁴⁰⁹ Agnes, *Family Law Volume I*. (At p. 10-12)

⁴¹⁰ Dhavan, "Introduction,".

⁴¹¹ Most prominent examples of such works are: Agnes, *Family Law Volume I*.; Agnes, *Family Law II*, 2011.; Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*.; Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

⁴¹² Agnes, *Family Law II*, 2011. Also, Narendra Subramanian, "Legal Change and Gender Inequality: Changes in Muslim Family Law in India," *Law & Social Inquiry* 33 (2008): 631; Werner Menski, *Modern Indian Family Law*, 1st ed. (Richmond, UK: Curzon Press, 2001). (At p. 9-20)

⁴¹³ Menski, "Legal Pluralism in Hindu Marriage."

It is an extremely important change that the feminist scholarship has started to acknowledge the fact that cultural and legal pluralism in India has survived the onslaught of colonial rule. It is also important to challenge the myth of Hindu Code as modernized and secularized Hindu family laws.⁴¹⁴ It is high time the legal scholars take cognizance and appreciate implications of the fact that even the reformed, modernized Hindu law has not been moving on the linear trajectory where one end was of customary, religion based pluralistic laws and the other end will be of uniform, homogenized secular laws.⁴¹⁵ It is also important that women's rights scholars take note of the values which underlie even the modern Hindu law, and which have refused to be written away through the processes of codification and modernization.⁴¹⁶

It is indeed a welcome change that feminist scholars are concerned about highly polarised and politicised debates around the issue of women's rights. Indian legal system especially judiciary in India has been striving to find ways to protect rights of women while being sensitive to cultural diversity.⁴¹⁷ Politicisation of the issues of women's rights and uniform civil code has indeed been responsible for ignorance amongst scholars, activists as well as judiciary towards important developments in India family law.⁴¹⁸ It is therefore important that women's rights scholars express concern over highly communalised media campaigns and react loudly about the harmful effects of such campaigns on rights of women.⁴¹⁹ There are important

⁴¹⁴ Madhu Kishwar, "Codified Hindu Law: Myth and Reality," *Economic and Political Weekly* 29, no. 33 (1994): 2145–61. For a strong support of this view see Menski, *Hindu Law*. Also, Menski, *Modern Indian Family Law*, 2001.

⁴¹⁵ Menski, "Legal Pluralism in Hindu Marriage."

⁴¹⁶ Kishwar, "Codified Hindu Law: Myth and Reality." Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: Oxford University Press, 2003); Werner Menski, *Modern Indian Family Law* (India: Routledge, 2013).

⁴¹⁷ Subramanian, "Legal Change and Gender Inequality."; Madhu Kishwar, "Pro-Women or Anti-Muslim? The Shah Bano Controversy," *Manushi* 32 (1986): 4–13. Kishwar invokes example of 'shah bano controversy' to show how this one particular judgement became a reason imparting communal and political over tones to the issue of rights of Muslim women to maintenance.

⁴¹⁸ Werner Menski, "Solemnisation of Hindu Marriages: The Law and Reality," *Kerala Law Times*, Journal Section, 1985, 1–10.; Gupta, "Women, Family Laws and Informal Relationships."

⁴¹⁹ For extensive discussions on politicisation of the issues relating to rights of women see, Agnes, *Law and Gender Inequality.*, Flavia Agnes, *From ShahBano to Kausar Bano, Contextualising the Muslim Woman within a Communalised Polity*, Ania Loomba and Ritty Lukose (eds.), *South Asian Feminisms*, , 33-53, Duke University Press, 2012. Lamenting over the politicised debates relating to the project of the Uniform Civil Code Agnes states,

insights which help us understand the relationship between law and plurality in a different light.⁴²⁰ It is also possible to understand the complex and contradictory ways in which colonial rule influenced Indian society. The literature of post-1990s phase provides very important insights about the ways the issue of women's rights took shape in India during 19th and 20th century. The new phase in women's rights scholarship is significant for scholars' willingness to challenge the presumptions about anti-women nature of customary practices, more particularly the practices relating to marriage formation and dissolution.

This scholarship is an important step forward for the cause of women's rights as scholars now acknowledge that the prevalent understandings about indigenous traditions in India are result of over-emphasis on one aspect of the traditions in a context of civilisational encounter.⁴²¹ Such revelations are important as they not only emphasize the need for questioning scholars' understandings about indigenous traditions, but also open the way for deeper engagement with indigenous traditions.

Socio-legal scholarship in its new phase carries a promise to acknowledge and rectify the mistakes of scholarship of the pre-1990s phase, in order to better serve the cause of protection of rights of women. Scholars in this new stream aim to offer re-conceptualization of relationship between law, feminism and traditions in India in order to ensure that law can be sensitive of diversities in society and can also protect rights of women.

such a project, which would inadvertently situate minority women in an antagonistic relationship against their own communities, and hence may not receive the support of women of these communities, who have been subjected to extreme violence and humiliation, as Muslims, during communal violence. (p. xxvii)

Also see Patel, "Indian Muslim Women, Politics of Muslim Personal"; Vatuk, "Where Will She Go? What Will She Do?". Highlighting prejudices against matters relating to Muslim law Vatuk, on the basis of her field work states,

My evidence suggests that even though possibility of being unilaterally divorced doubtless weighs heavily upon the wife in any troubled marital relationship and accentuates the need for her to be submissive and placating at any cost if she wishes to remain married, most *talaqs* are probably not pronounced "on a whim", as the popular stereotype would lead one to believe. (at p. 241)

Also Rajeev Dhavan, "The Road to Xanadu: India's Quest for Secularism," in *Religion and Personal Law in Secular India: A Call to Judgement*, ed. Gerald James Larson (Bloomington and Indiana Pollis: Indiana University Press, 2001), 301–27.

⁴²⁰ For a detailed discussion on this point see, Menski, *Comparative Law in a Global Context*.

⁴²¹ For a detailed discussion see Agnes, *Law and Gender Inequality*.

But has that actually happened? Have all the new insights about the concepts of law and religion, about the nature of colonial rule and its interactions with the non-western traditions actually remoulded the nature of dominant socio-legal discourses/legal scholarship in India? Is the series of binary oppositions such as family v individual, religious v secular, contract v sacrament which have been used since colonial era to make sense of non-western cultures, a thing of past? Do we now have scholarship which offers ways to understand relationship between law, traditions and women's rights discourses in a different light- where law is not to be used as an instrument for eradication of influence of traditions? Is there now available some indigenous versions of legal feminism, which suggests a new "path of progress" where eradication of influence of traditions or transition from *dharma* to law are not the essential requirements for women's empowerment in India? Most important of all, considering that influence of traditions in India is closely linked to the institutions of marriage and family, is there now available some scholarship which does not any longer consider importance to the institutions of marriage and family as the main element for all injustices against women.

The next chapter seeks answers to the above-mentioned questions. It undertakes a closer analysis of the emerging changes in the socio-legal scholarship. It also looks into a recent legal development, the Domestic Violence Act, 2005 which emerged as a result of increasing concern for plurality in women's rights scholarship.

It argues that though representing an advance over those earlier streams, none of these works go far enough in making use of new understandings about the colonial rule and nature of law for rethinking relationship between law and cultural diversity. It further shows none of these works, despite the fact that they draw upon insights of critical theory, show signs of deeper engagement with indigenous traditions.

Undertaking closer analysis of a few recent works which reflect a shift in perception towards law and the state the next chapter demonstrates that despite changing perceptions about nature and role of law and colonial rule, socio-legal scholarship, particularly, women's rights scholarship has remained engaged in reinforcing opposition between law and indigenous traditions. It shows that contemporary

scholarship does not show any signs to give up the simplistic framework inherited from colonial era (i) where every instance of denial of rights to women was to be attributed to the institutions of family and marriage and to continuing influence of religions and indigenous traditions on all spheres of life, including legal sphere and (ii) where solution for every such instance of denial of rights was presumed to be eradication of influence of traditions through replacement of tradition based laws with laws promulgated by the secular state which could be seen to be based on individual will and which grant rights to women. The next chapter draws attention towards the fact that the critique of 'evolutionary theory' and acknowledgement by scholars that the notions of tradition and modernity have been colonial era constructs has not induced any significant change in feminist scholarship. The works that have emerged during last three decades shows no signs to give up the presumptions that:

- (1) Concern for women's dignity requires a development along the lines of western societies
- (2) Sexual, moral and economic oppression of women is inherent in non-western cultures since these cultures, not having been able to achieve separation between law and religion, give more importance to the institutions of marriage and family
- (3) Women can be ensured various rights within and outside the sphere of family only when indigenous cultures are pushed ahead on the 'scale of progress' to undergo fundamental transformation so as to give more importance to individual will and individual rights than to 'duties' and to the traditional concepts of the sanctity of marriage and family.

Chapter Four

Changing Perceptions towards the Relationship between Law, Traditions and Rights of Women: Important but Insufficient Efforts in the New Direction

Lasting impact of colonial rule on all its ex-colonies is an undisputed fact. Colonial rule, with its most important dispensation- the modern law- has been instrumental in initiating a process of irreversible change in its ex-colonies, and India has been no exception. As discussed in the previous chapters, till few years ago, the task of the scholars and activists was relatively simple: to follow a well-tested path, which had already been tread by the British. However, in the recent years the situation has changed. The task is much more difficult. Scholars are now required to devise an indigenous version of scholarship which can be sensitive to cultural and religion based diversity in India.

It is a welcome change that socio-legal scholarship in India seems to be rising up to the above challenge. It is important that there has emerged rich literature reflecting scholars' willingness of going beyond the simplistic framework, which dominated women's movement till the 1990s. It is an important change that the feminist scholarship acknowledges that cultural and legal pluralism in India has survived the onslaught of colonial rule, and is willing to deconstruct the long-held myth that the uniformity in laws is a sign of progress. Scholars' changing perceptions towards legal uniformity and the role of the state in regulating personal, intimate relationships has resulted in an important legislative development in the form of the Protection of Women from Domestic Violence Act, 2005 (The 2005 Act). Seen as a landmark development in the history of women's rights this Act aims to grant rights to women even in those intimate relationships which cannot be considered valid under any of the marriage laws in the country. But have these changes resulted in emergence of new tools for dealing with prevailing diversity in India while protecting rights of women? Has it been possible to address the colonial legacy of antagonism between cultural and legal pluralism and rights of women? More

specifically, do we have better appreciation of the reasons as to why marriage continues to be a sacrament in India or for continuing importance to the institutions of marriage and family in Indian society?

Seeking answers to the above questions, this chapter undertakes closer analysis of recent scholarly and legislative developments in India. Divided into two sections it aims to explore implications of recent shift for the cause of women's rights in India. The first section undertakes a close analysis of pioneering inter-disciplinary works which represent a new phase in socio-legal scholarship in India. It looks into two important changes- first, the changing perception towards the idea of colonial rule as a beneficial legacy and second, increasing concern for differences between women. The second section looks into functioning of the 2005 Act. This chapter argues that though representing an advance over the earlier streams, the recent developments do not go far enough in the task of rethinking relationship between law and cultural diversity. There aren't signs either of deeper engagement with indigenous traditions. Antagonism towards indigenous traditions continues to characterize the post-1990s scholarship as much as the pre-1990s phase. The stand in favor of plurality or differences among women in recent works is not about appreciating and understanding cultural and legal pluralism as it has been prevalent in India. It also does not mean including those voices which do not perceive antagonism between rights of women and traditions or religion-based institutions of marriage and family as sources of one's empowerment and way of life. Instead, what we have is the scholarship which reinforces the understandings: that continuing influence of religions and traditions is the main obstacle to women's empowerment and that women's empowerment can be a reality only by bringing to culmination the process of eradication of influence of religions and traditions from all spheres of life.

4.1 Unchanging Nature of socio-legal discourses in India: Persisting Hostility towards Cultural and Legal Pluralism

4.1.1 The Concept of Ancient Tradition: Merely a Colonial Construct to Perpetuate Denial of Rights to Women

First important change that has come to characterize socio-legal scholarship in India during past few decades is the anti-colonial stance adopted by scholars. As discussed in the previous chapter the anti-colonial stance consists of the willingness of scholars to question the idea that colonial rule, like in other colonies, initiated the process of progress and modernization in India. Many new works from different disciplines in last few years have been concerned about highlighting the fact that the colonial rule was responsible for denigration of indigenous traditions. With the anti-colonial stance, the current streams of socio-legal scholarship undoubtedly appear very different from the pre-1990s literature where scholars and activists were convinced about the beneficial legacy of colonial rule.

Anti-colonial stance amongst scholars is important as it makes it possible to challenge the well-established binaries like religion v law, tradition v modernity, public v private etc. The scholarship with anti-colonial stance has also been able very effectively to bring to forefront that colonial rule used the issue of women's rights to show India as a primitive and barbaric culture. Most of the interdisciplinary works are of great value with their insightful analysis of discourses around the social reform legislations which, till recently, were believed to be ushers of modernity in India. Literature of last few decades is full of insights which establish that our struggles for social change in India have been based on the 'authoritative accounts' of British administrators whose ignorance about India was a proof of their objectivity.⁴²² These works are valuable as they deconstruct the colonial policies to reveal patriarchal biases of British officers or to highlight oppressive nature of the state law or to illustrate abuse of tradition even by the natives in self-interest. For example, Lata Mani's critical analysis of discourses relating on *Sati* makes an important contribution as she highlights how discourses around *Sati* were more an occasion for the emergence of artificial, distorted understandings of traditions and

⁴²² Stokes, *The English Utilitarians and India*. (At pp. xi-xvi)

personal laws by the officials, missionaries, and the indigenous elite.⁴²³ Sangari and Vaid's work is also an important contribution as it challenges the public-private dichotomy which dominated women's rights discourses till the 1990s.⁴²⁴ Division of life spheres into public and private spheres has been a great misconception, which has wrongly influenced scholarly understanding of non-western traditions. Interdisciplinary works, which have challenged the idea of colonial rule as a beneficial legacy, have also inspired legal scholars to draw upon the insights of critical theory and challenge the simplistic framework of social change. For example, legal scholars like Agnes⁴²⁵ and Kapur and Cossman⁴²⁶ made important contributions in the late 1990s as they incorporated insights of critical theory to understand role of law in social change, amidst strong skepticism of some legal scholars who questioned the relevance of these insights for the Indian context.⁴²⁷ Much to the contrary, Kapur and Cossman find these recent Western developments in legal feminism of special significance for India, as, in their view, these insights provide essential guidelines to forge 'a fundamental shift in the way that we conceptualize law',⁴²⁸ and thereby, to

⁴²³ Mani, "Contentious Traditions." Offering critical analysis of debates relating to Sati Mani states, Official knowledge [about Sati] was generated through questioning pundits resident at courts. The interactions between pundits and judges, and pundits and magistrates, are valuable for plotting the logic of official discourse. Analysing them clarifies how the very formulation of official question shapes the responses of pundits and how the answers of pundits are interpreted in specific ways by officials. (p. 121)

⁴²⁴ Sangari and Vaid, *Recasting Women*. For feminist criticism of public-private dichotomy in general see Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96, no. 7 (1983): 1497–1578; Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1985); Jenny Morgan, "Feminist Theory as Legal Theory," *Melbourne University Law Review* 16 (1988): 743–59.

⁴²⁵ Agnes, *Law and Gender Inequality*.

⁴²⁶ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*.

⁴²⁷ Archana Parashar, "Essentialism or Pluralism: The Future of Legal Feminism," *Canadian Journal of Women and the Law* 6 (1993): 328–48.; Dhanda and Parashar, *Engendering Law*. Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Appearing to be aware of such resistance and objection to relevance of theoretical developments in west for India, Kapur and Cossman offered a mild defence as they stated,

Subversive Sites is the product of a collective endeavor. In collaboration, we draw on the insights offered by feminist legal scholars and activists in different parts of the world. Feminists outside of India have developed diverse approaches to feminism and law, which in our view, offer some potential for advancing the analysis of feminist legal struggles in India. We do not believe that some this scholarship can be unproblematically applied to the Indian context. But we do believe that some of the insights that have emerged from this expansive and increasingly sophisticated literature may be of assistance in revisioning feminist engagement with law in India. (At p. 14)

⁴²⁸ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 285)

build a positive and constructive role for the law.⁴²⁹ Rather than rejecting critical theory as irrelevant authors like Agnes, Kapur and Cossman posited that these insights can be useful to strengthen feminist engagements with law by revealing the complex and contradictory nature of law.⁴³⁰

As discussed in the previous chapter, the changing perceptions about relationship between law, colonialism and rights of women is undoubtedly an important change. However, an unfortunate situation is that a closer look into the inter-disciplinary literature, as we shall see in the following discussion, reveals a different story- of continuing antagonism between rights of women and indigenous traditions. There is no change in scholars' perceptions about the possibility and necessity of eradicating influence of traditions. Instead, two main concerns of scholars of the new stream seem to be: first, to undertake more intensive efforts to establish the necessity of eradicating influence of traditions from all spheres of life and second, to devise sophisticated strategies to achieve the above.

In most of the literature of the post-1990s phase which draws on the insights of critical theory, the scholars' main grievance against the colonial administrators is not that they caused denigration of Indian traditions or the traditions based institutions of marriage and family. For many of these works, British administrator's claims about 'degradation of Hindu civilization', about 'the abject position of Hindu women' are too obvious to be questioned. Charges of ignorance, arrogance and ethnocentrism on imperial administrators and even the realization that 'tradition' and 'modernity' are colonial constructs,⁴³¹ have not inspired efforts to look underneath these constructs and seek a better insight into traditions. Scholars share colonial administrators' firm conviction that elements such as 'inferiority of women',⁴³²

⁴²⁹ *ibid.*

⁴³⁰ *ibid.* Explaining their endeavour in the work the authors mention,

We will attempt to move beyond the understanding of law as a simple instrument of either oppression or social engineering which has informed much of the earlier work on women and law in India. Building on the work of recent feminist studies, we argue that the role of law cannot be adequately captured by a dichotomous understanding of law as either an instrument of oppression or of liberation. We believe the terrain of law is much more complex, in both the oppression of women, and in its promise for challenging that oppression. (At p. 11-12)

⁴³¹ Sangari and Vaid, *Recasting Women*.

⁴³² Chandra, *Enslaved Daughters*. (At p. 6)

‘female subordination’,⁴³³ enslavement of women, strict sexual, moral and economic control of women by men, are integral part of Hindu traditions and have been inherent in all the traditional forms of life in Indian society.

The scholars are also not much concerned that during colonial rule indigenous traditions came to be constructed and labeled as backward, oppressive and non-progressive forces, which needed to be eradicated through the instrument of law. Instead, the pre-dominant concern for many works seems to be to highlight the apathy of otherwise committed British rulers towards the deplorable condition of women in the Indian/Hindu society. The scholars do not cast much doubt on the humanitarian and democratic commitments of British, nor do they intend to question in anyway superiority of the British civilization.⁴³⁴ There is not much doubt about the necessity of civilising mission in India.⁴³⁵ The anti-colonial position in the scholarship appears to be more about admonishing British rulers, both explicitly and implicitly, for not bringing this mission to culmination, for their half-hearted and insufficient efforts to bring about a thorough reformation in India and for depriving their subjects, especially women from the miracles of enlightenment.⁴³⁶

The common theme underlying most of the works which take an anti-colonial stance is: to highlight the inability of the British in displacing Hindu traditions while being aware of its degenerate nature. For example, Lata Mani appears to lament that the

⁴³³ *ibid.*

⁴³⁴ *ibid.*

⁴³⁵ Prominent examples for this position are: Sangari and Vaid, *Recasting Women.*; Chakravarti, *Rewriting History.*; Chandra, *Enslaved Daughters.*

⁴³⁶ Joanna Liddle and Rama Joshi, “Gender and Imperialism in British India,” *Economic and Political Weekly* 20, no. 43 (1985): 7; Liddle and Joshi write,

The British claimed they were a liberalizing force in the colonies, yet their espoused policy was of non-interference in Indian culture and religion. Clearly these two approaches were in conflict. (At p. 73)

Also Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India.* Highlighting lack of concern for women’s emancipation in colonial period Kapur and Cossman argue

The strategies of the social reformers were informed by a form of protectionism. Women were not assumed to be equal to men; indeed, the discourse of equality was strikingly absent from the debates, as were the voices of women themselves. Social reformers sought to eliminate customs and practices that they considered to be evils perpetrated on women. They sought protective forms of legislation, prohibiting these practices. The discourse within which these legal reforms were sought was heavily embedded with familialism (At p 52).

British, being more concerned with maintaining colonial rule, instead of simply dismissing Hindu traditions, attempted to find justification for abolition of *sati* within it. She points out that the discourse on *sati*, notwithstanding big rhetoric, was not an instance of ‘modernizing’ discourse as “it was not a secular discourse of reason positing a morality critical of ‘outmoded’ practices and a new conception of ‘individual rights’”.⁴³⁷ Chandra, focusing on the reforms relating to the age of consent for marriage implicitly supports the need of coercive action, and seems to regret that British, ‘rather, held back, democrats that they were, because of conservative Indian opposition’.⁴³⁸ Chakravarti, while analysing the debates that accompanied the Bill for raising the age of consent for marriage, also attributes the indigenous reformers’ resistance to the Bill only to one thing- their concern to protect Hindu tradition. In her view protecting Hindu tradition meant ensuring that female sexuality remain a subject of caste and community control, and traditional marital obligations of the wife to her husband are upheld so that husband could enjoy unrestricted access to wife’s body.⁴³⁹ Chakravarti draws attention towards British complicity in women’s oppression by not taking more direct and coercive measures for displacing the hold of oppressive patriarchal forces on the private sphere of religion and personal relations.⁴⁴⁰ Also, Sangari and Vaid, while they point out integral relation between public sphere land revenue policies and rights of women in private sphere of family, regret that the British, giving primacy to commercial interests of the Empire, strengthened instead of destroying traditional, highly patriarchal forms of ownership, which granted individual rights to ownership to men.⁴⁴¹ At the same time some other scholars, not finding the individual rights to property objectionable per se, regret that British perpetuated the traditional practice of exclusion of women from the ownership rights, and that British, given their own patriarchal biases, restricted only to men the opportunities ‘to release the individual energy’ from the traditional constraints.⁴⁴²

⁴³⁷ Mani, “Contentious Traditions.” (At p. 116)

⁴³⁸ Chandra, *Enslaved Daughters*. (At p. 6-7)

⁴³⁹ Chakravarti, *Rewriting History*.

⁴⁴⁰ *ibid.*

⁴⁴¹ Sangari and Vaid, *Recasting Women*.

⁴⁴² Agnes, *Law and Gender Inequality*.

While scholars take note of the fact that during colonial rule various elements related to Hindu traditions received very narrow interpretation, the main concern is not to challenge such interpretations and to make efforts for nuanced understanding of traditions in India. The concern is also not to draw attention towards the core elements of Hindu worldview like the idea of universe as a self-controlled order, the concept of *svadharma*. Instead the scholarship in post-1990s phase rejects very existence of the concept of ancient Indian traditions in pre-colonial India.⁴⁴³ The scholars blame not only the British rulers but also Europeans in general for further entrenching patriarchy by having contributed in giving birth to an idea like ancient Indian tradition. The scholars, quite ironically, go to the extent of suggesting that the concept of tradition or the idea of traditions as ancient phenomena, as something existing since time immemorial as integral part of worldview of the people is a mere colonial construct, brought into existence only during colonial rule. And, the influence of traditions on common people, scholars suggest is, merely a result of ideological domination by indigenous elite with the aim of perpetuating patriarchy and domination on women and other weaker groups.

The new streams are not about making efforts for more nuanced understandings of the important concepts such as ‘marriage as sacrament’, ‘sanctity of marriage’ and ‘stability of family’. Instead for the scholars in the new stream, the above notions never existed in pre-colonial India, and were brought into existence for the first time only during colonial rule. Moreover, the belief has also been that the British rule offered the occasion for introduction of these notions into in the lower caste groups,

⁴⁴³ Chakravarti, *Rewriting History*. Considering influence of traditions as merely an ideological construct Chakravarti notes,

What was gradually and carefully constituted, brick by brick, in the interaction between colonialism and nationalism is now so deeply embedded in the consciousness of middle classes that ideas about the past have assumed the status of revealed truths. Any suggestion that we might fruitfully analyse the manner and the different stages by which this body of knowledge was built up, or how and when we came by our immediate intellectual and cultural heritage (*which is often only a hundred and fifty years old*) would therefore be considered quite unnecessary or even futile. But for women in particular this heritage, this perception of the past, of the ‘lost glory’, is almost a burden. It has led to a narrow and limiting circle in which the image of Indian womanhood has become both a shackle and a rhetorical device that nevertheless functions as a historical truth (emphasis added) (At p. 28).

or even in minorities, where, supposedly, marriage was a mere contract,⁴⁴⁴ where people lived under loose or perhaps no norms of moral and sexual conduct, where formation and dissolution could be organised through economic exchanges.⁴⁴⁵

Most new stream works blame colonial rulers for giving an artificial sense of cultural and political unity to the otherwise isolated, disconnected and often warring caste and clan groups, and, above all, by having brought into existence a concept of tradition, where according to scholars, none existed.⁴⁴⁶ Sangari and Vaid implicate British for having facilitated revival of certain constructs, such as ‘ancient Hindu tradition’, ‘cultural continuity’, ‘spirituality’, ‘institution of family’, which in their views found existence only during colonial rule with an aim to oppress women or lower caste groups.⁴⁴⁷ Convinced that traditional models of family are sources of oppression for women, Sangari and Vaid regret that not only Indian women social reformers but even the western reformers did not find it necessary to challenge traditional institutions of marriage and family in India. Sangari and Vaid regret that during colonial rule while Indian women reformers remained limited to re-constituting ‘themselves with varying degrees of conformity’ to ‘the offered models’⁴⁴⁸ of family and tradition, a western reformer such as Annie Beasant who had been an ‘active socialist, feminist, free thinker, union organiser, strike leader’⁴⁴⁹

⁴⁴⁴ However, in contrast to the popular view that marriages in Muslim are contracts see Choudhury, “(Mis)Appropriated Liberty.” Choudhury writes,

It has been said by some scholars that Muslim marriages are essentially contractual in nature. There is offer, acceptance, and consideration. Yet, it would be a mistake to reduce marriage to such a mere contractual formality similar to a contract for services or goods. Marriage is considered a sacred institution that all able Muslims are enjoined to enter. It is of central significance in the ordering of group life and, consequently, gender relations. Moreover, Muslim marriage laws reflect a traditional understanding of how partners in a marriage relate to each other and outline a set of duties and rights for each partner. These duties and rights begin at the very onset of marriage through the requirement of mahr, or consideration that must be given or promised before a marriage can be solemnized. (70,71)

⁴⁴⁵ Agnes, *Law and Gender Inequality*. Agnes states,

‘since women of the lower castes were free relatively free from these notions of purity and pollution, they were governed by a relatively lax code of sexual morality and women held a slightly higher status’. *Marriages among the various lower castes were less sacramental and more contractual*. (emphasis added) (At p. 20)

⁴⁴⁶ Chakravarti, *Rewriting History*.

⁴⁴⁷ Sangari and Vaid, *Recasting Women*.

⁴⁴⁸ *ibid.* At p. 14

⁴⁴⁹ Chakravarti, *Rewriting History*. (At p. xii)

before coming to India, left behind all these dimensions of her work as she ‘threw herself in the task of the spiritual and national regeneration’.⁴⁵⁰ Chakravarti finds deeply problematic Annie Beasant’s arguments that ‘education was not to make women think of themselves as rivals and competitors to men in all forms of outside or public employment as was becoming prevalent in the west’ and that ‘west has created artificial problem between the sexes’. According to Chakravarti, Beasant’s arguments are evidence of the fact that Beasant gave up the cause of women under influence of the colonial constructs and therefore did not find subordination of women through perpetuation of ‘distinction between the public and private domain and sexual division of labour’ problematic in any sense.⁴⁵¹

While ensuring agency to women is one of the major concerns of the most feminist works in recent years, common people, according to the recent streams, have had no agency in creating, sustaining or perpetuating traditions, and if there is any, it is result either of ‘ideological determination’⁴⁵² or false consciousness.⁴⁵³ The recent streams undoubtedly differ from the works in the previous streams as scholars no longer believe that in India influence of traditions can be eradicated by substituting traditions or religion based laws with the secular laws (or laws promulgated by the State). But there is no doubt that the influence of religion needs to be eradicated and that this can be done through appropriate strategies- the most important seems to be to check ideological domination of common people. Even in recent works there are dominant tendencies to label any kind of resistance to feminist demands or to a pro-women legislative reform change as anti-women or non-progressive.⁴⁵⁴ Also, any efforts which put reliance on the indigenous framework or on religion and traditions are suspect, as attempts to revive oppressive and patriarchal traditions.

⁴⁵⁰ *ibid.* At p. viii

⁴⁵¹ *ibid.* At p. xii-xiii

⁴⁵² Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 59)

⁴⁵³ *ibid.* At p. 259

⁴⁵⁴ One such prominent examples from legal works is Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. It is example of the kind of scholarship where reference to any of the traditional imageries such *matri-shakti* or women as Goddess are suspect as they have the potential to re-inscribe women in roles of wives and mothers. (At p. 247)

4.1.2 Institution of Family: A Site for Oppression of Women

The traditional institution of family and its relationship with rights of women has always been a matter of central focus for scholars since pre-independence era. Till few years ago, scholars accepted unquestioningly the colonial idea of family as a religious institution in India governed by immutable norms found written in the scriptures. However, post-1990s has been the time for emergence of pioneering works of authors like Kapur and Cosmann and Agnes, who took a distinct break from the above approach as they highlighted family as an ideological and cultural construct. Aiming to challenge the idea which privileged only one form of family as natural, immutable and universalized Kapur and Cossman made an important contribution in their work *Subversive Sites* as they drew attention towards a rich diversity of family forms in which women lived and continue to live in India. This work also reflects much better understanding of social reality in India as the authors regret that a familial ideology⁴⁵⁵ - a single notion of ideal family and the roles of women therein have come to dominate the thinking about family forms in India and have been used as standards to judge the women in all other family forms. In addition to various forms of family the authors have also highlighted varied patterns

⁴⁵⁵ *ibid.* Explaining the term ‘familial ideology’ the authors state

By familial ideology, we are referring to a set of norms, values, and assumptions about the way in which family life is and should be organized; a set of ideas that have been so naturalized and universalized that they have come to dominate common sense thinking about the family..... Familial ideology constructs the family as the basic and sacred unit in society, and women’s roles as wives and mothers as natural and immutable. This vision of the family, and women’s roles therein, appears throughout the law as self-evident, and beyond question. It is a vision of the family that has operated to undermine women’s full and equal participation in society, and which continues to justify this inequality. It is a vision of the family that continues to limit law’s ability to deliver on its promise of equality for women. (At p. 14)

Kapur and Cossman attribute continuing subordination of women in India to what they identify as the dominant familial ideology. Scholars state,

Despite the diversity of family forms and experiences in India, it is possible to identify a dominant familial ideology, based on the ideal of the joint family, and certain prescribed roles for men and women therein. (At p. 15)

One of the main endeavours of authors in this work has been to highlight influence of familial ideology in the areas of constitutional law, family law, criminal law, labour law, and the new economic policies. Although in chapter related to constitutional law, it is stated,

we are not suggesting that familial ideology will always operate to preclude effective constitutional challenges on the basis of sex discrimination. Our claim is much more modest- that in examining the legal legacy of challenges on the basis of sex discrimination, familial ideology has informed and constrained many decisions. (At p. 175)

For use of the term ‘familial ideology’ in Sri Lankan context see Coomaraswamy, “To Bellow Like a Cow.”

of division of labour among men and women across different economic classes or even within the same economic class.⁴⁵⁶ Kapur and Cossman also highlight that the familial ideology and sexual division of labour, where men are seen as bread-earners and women are assigned domestic roles, are not the concepts that can be unproblematically applied to describe the way in which all Indian women live in and are subordinated in families. These authors rightly note,⁴⁵⁷

Many women live in nuclear, supplemental nuclear or single parent families, *not* in joint families. And many women work as wage labour outside of the family, and as unpaid but productive labour inside of the family, wherein they make important- often essential-contributions to the financial provision of the family. And the nature of women's work both inside and outside of the family is mediated by relationships of class, caste and other materially specific contexts.

Kapur and Cossman along with Agnes made an important contribution as they offered a nuanced and advanced analysis as compared to the works in earlier streams as they take note of the normative ideals about the institutions of marriage and family in pre-colonial India and also notice the phenomena of 'divergences between the empirical realities and the normative ideals'.⁴⁵⁸ These authors definitely take a step forward from the earlier streams as they highlighted how during colonial rule something which was merely a normative ideal in the society came to be enforced through the instrument of law, to the great disadvantage of the people in different forms of family. However, despite above steps, there is a lot that has remained unchanged.

The nuanced analysis in these works is not about challenging the colonial era conclusion that family is a site of oppression for women. There is no place for deliberations on the concepts of cosmic order and the *dharma* which offered

⁴⁵⁶ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Especially Chapter 2, *Women, Legal Regulation and Familial Ideology* (At pp. 87-172)

⁴⁵⁷ *ibid.* At p. 94

⁴⁵⁸ *ibid.*

conceptual foundations for co-existence of diverse forms of family in India.⁴⁵⁹ Despite the realization that colonial rule resulted in emergence of artificial constructs like ‘Hindu law’ and Hindu traditions’, the narrow and restricted understandings of the terms Hindu family and Hindu marriage are intact. There are also no efforts to challenge or question the colonial era presumptions: that Hindu family is a religious institution governed by set of written norms and that being a religious institution it ensures sexual, moral and economic suppression of women by denying various economic and social rights to them. Instead of making efforts to show that diverse forms of family were as much part of Hindu traditions and continue to have recognition in the modern Hindu law, *Subversive Sites*, remains a work which reduces Hindu family to its normative ideal, and is more concerned about establishing its anti-women nature. For Kapur and Cossman too, the concern is not to revisit the concept like ‘sanctity of family’ or to further explore the reasons for the importance given to the institution of family in Hindu worldview. There are no efforts to appreciate the idea of family as a spiritual resort or as a means to serve the interconnectedness.⁴⁶⁰ Instead, for the post-1990s phase the root of the problem lies in the very idea of ‘sanctity of family’ and what are suspect are any efforts which claim ‘sanctity of family’ as an ancient phenomena in India.

The unfortunate part is that while highlighting plurality of family forms available in Indian society and accepting that joint family is a ‘normative ideal’, the authors’ main concern is not merely to point out the misconceptions perpetuated in the Indian legal system about the concept of *dharma* and about Hindu Law. The concern is also not limited to the fact that since colonial era law has been privileging one form of family at the cost of delegitimizing the other forms of family and entitlements and obligations of individuals therein. *Subversive Sites* does not make any effort to understand whether co-existence of these pluralistic forms of family and the normative ideal of joint family or the family as a basic and sacred unit in society is an ancient phenomena.

⁴⁵⁹ For a detailed discussion on diversity in institutions of marriage and family see *supra* chapter 2

⁴⁶⁰ *Supra* chapter 2

As works like *Subversive Sites* take note of the fact that large number of legislative changes has not resulted into substantial improvement in social, political and economic condition of women in India, a major concern of scholars is to suggest reasons for the continuing gap between formal equality and persisting substantive inequality. Authors point out, and rightly so, that under-enforcement of law and inaccessibility of the legal system to the majority of Indian women, are some of the important reasons for the gap between formal equality rights and substantive inequality. However according to authors the more important reason for the above gap is the fact that: “the realization of formal equality rights in the legal regulation of women inside and outside of the family has not displaced the familial ideology.”⁴⁶¹

While identifying ‘familial ideology’ as the main reason for subordination of women by law, authors have been careful in mentioning that their attack on familial ideology must not be misunderstood as disregard for ‘familial relations’ of the institution of family. Kapur and Cossman are conscious of the fact that family is an important institution not only in India but also in almost all the societies in the world. Being aware that “the family is asserted throughout national and international human rights documents as ‘the basic and fundamental unit of society’”⁴⁶², Kapur and Cossman have been conscious that feminist research and criticism on the family may be understood as attack on the family, as they believe is often done. They have been careful in pointing out that

The critical analysis and deconstruction of the role of the family and familial ideology in the sub-ordination of women does not necessarily imply that the family must be rejected or destroyed. Rather feminist criticism has attempted to highlight the extent to which the family has operated as a site of contradiction for women. Feminist research has attempted to illustrate, for example, that the family is essential to women’s socio-economic survival at the same time it is the site of women’s socio-economic oppression. The

⁴⁶¹ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 14)

⁴⁶² Article 23 of the International Covenant on Civil and Political Rights. The article states, ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

family may be an important source of emotional support for women at the same time as it may be a site of emotional destruction and violent relationships.⁴⁶³

Presuming that their efforts to show family as a site of oppression may be labeled as pro-family or anti-family, Kapur and Cossman also make a conscious effort to caution against any such labeling, as they state that such a dichotomous labeling may not adequately describe the subtle and complex role of the family and of the legal regulation in the oppression of women. They also make it clear that their aim is to argue “that women’s roles and responsibilities within the family must be recognized and affirmed, without being naturalized or universalized”.⁴⁶⁴

In order to show that their criticism of family is not an attack on family Kapur and Cossman have made an important distinction between familial ideology and ‘importance of familial relations’. Explaining that distinction the authors state

Subversive Sites simultaneously argues that familial ideology must be resisted and deconstructed, while the importance of familial relationships and the roles that women play in their families neither be denied nor devalued. Feminists engaged with law must find ways to affirm these roles and relationships, without rigidly reinforcing them as women’s natural destiny. We argue for a feminist legal revisioning which recognizes and challenges the hegemonic potential of law and familial ideology. We seek subversive spaces that law might offer in reconstructing women’s roles and identities in

⁴⁶³ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 98-99). Trying to establish that their challenge to familial ideology should not be seen as challenge to the institution of family per se Kapur and Cossman further argue

while some feminist perspectives and research on family have concluded that the family should be rejected, others have argued for a more complicated understanding of the role of the family in women’s lives. Those aspects of the family that are oppressive must be rejected and restructured, while those aspects of the family that are most important must be supported. For example, we might develop policies that attempt to eradicate women’s powerlessness and enforced dependency within the family, while at the same time supporting women’s role in the provision of child rearing and child care, health care, food production and nutrition in the family. Similarly, it is possible to argue that the legal regulation of women needs to be defamilialized in some respects without necessarily arguing that the family must be rejected. (At p. 99)

⁴⁶⁴ *ibid.*

ways more conducive to their full and equal participation in social, political, economic, and cultural life.⁴⁶⁵

From the point of view of women's rights the above-mentioned distinction between 'familial ideology' and importance of familial relationships is definitely important. It emphasizes a valid point that the concern for saving institution of family should not result into denial of some basic human rights to women, such as the right to seek divorce or the right to economic entitlements, or even the right to care and custody of their children. Authors are rightly concerned about judges' endorsement of various assumptions about women and women's role, which are claimed to be based on traditions, and which have the effect of constituting women as weak, as entities in need of protection.⁴⁶⁶ They are also right in challenging such assumptions about role of women which restrict women to the role of wives and mothers preventing them from developing other facets of their existence outside the sphere of family to have equal participation in social, political, economic and cultural life. But what remains missing in *Subversive Sites* and also in other works concerned about rights of women in family is any deliberation on the issue whether there exists an inherent conflict in the above concerns and the idea of sanctity of family or family as basic and sacred unit in society. Also, what is missing is any analysis of the case laws whether it can be possible to grant rights to women while upholding the idea of sanctity of family and marriage. The larger concern for scholars is to establish that not only none of the above concerns could ever be addressed in traditional social structures, but also to prove that these concerns for well-being and rights of women will remain unaddressed in India as long as judges and the legal system keeps reinforcing the idea of sanctity of family.

Moreover, *Subversive Sites* also has an effect of feeding into the process of politicization of the issue of women's rights⁴⁶⁷. If one looks closely into this work, it

⁴⁶⁵ *ibid.* At p. 14

⁴⁶⁶ For critical analysis of protectionist attitude towards women see Vatuk, "Where Will She Go? What Will She Do?"

⁴⁶⁷ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Authors state, feminist research and criticism on the family has often been misunderstood as attacking the family. Indeed, this understanding of the feminist approach to the family has frequently been

appears pitted against traditions in India, especially against Hindu traditions, as the main aim of the work is to establish subordination of women in India society due to the ideal of joint family.⁴⁶⁸ At some place the authors do take note of the fact that the family can be source of socio-economic as well as emotional support for women. However, according to subversive sites no such value can perhaps be accorded to the institution of joint family. While invoking the issue of centrality of the institution of family in India, it appears that the authors' concern is not about those cases where sanctity of family may have been invoked to deny rights to women. Their concern is also not about scrupulous individuals abusing legal system and cloak of culture to deny rights to women under the garb of the argument that in Indian traditions role of women as mothers and wives is natural and immutable. Instead concern of the authors, much like colonial administrators, appears to be to establish that the traditional ideas of family as a basic unit in society or traditional roles of women as wives and mothers are anti-women, in other words are in opposition to the rights of women, and that rights of women can be protected only by eradication or displacement of these traditional ideas by law.⁴⁶⁹

deployed to delegitimize and reject feminism, and (...) to foster support for right wing and reactionary social movements that want to 'save' the traditional family from these attacks. (At p. 98)

⁴⁶⁸ For similar arguments also see Menon, "It Isn't about Women." Presenting Uniform Civil Code as only a tool of Hindu majority to oppress the minorities, especially the Muslims Menon writes, Muslim Personal Law is already modern in this sense, since it has since the 1930s enshrined individual rights to property, unlike Hindu law, in which the family's natural condition is assumed to be "joint". In the decades of the 1930s and 1940s, contrary to later discourses about Muslim law being backward, it was Hindu laws that were considered "backward" and needing to be brought into the modern world of individual property rights.

⁴⁶⁹ For similar apprehensions in Sri Lankan context see Coomaraswamy, "To Bellow Like a Cow." Expressing concerns about use of traditions based symbols for empowerment of women Coomaraswamy writes,

Women's empowerment in these traditional societies has manifested itself not through rights ideology but through family ideology. There have been in South Asia recently a spate of writings about "Mother, Mother-Community, and Mother-Politics". (At p. 46)

Acknowledging that South Asia has the greatest concentration of women heads of state, she further mentions,

There is ideological acceptance of women in the public realm, but this is because these women have appropriated the discourse of motherhood. Of Course, the glorification of woman as mother means the denigration of unmarried women, widows, childless women, and divorced women. And yet this ideology is so powerful that the present Tamil Nadu Chief Minister Jayalalitha has appropriated motherhood as a symbol even though she is neither married nor a mother. She is called the "Avenging Mother" from the context of being a protector of the poor and underprivileged.

There are no efforts anywhere in the work to understand whether concepts like ‘traditional institution of family’ and ‘traditional roles of women’ actually preclude granting various social and economic rights to women. Traditions’ based institutions are to be fought against. Any discourses which give importance to the roles of women as wives and mothers need to be resisted. There is an apprehension that supporting them in any sense would mean restricting women *only* to the role of wives and mothers denying them their rights and their identity as women.⁴⁷⁰ Or else, emphasis on traditional roles of women, may be a well thought strategy of ‘fundamentalist’ or ‘traditionalists’ to put double burden on women, to call for women to perform more work.⁴⁷¹

A dominant concern of *Subversive Sites* is the fact that the normative ideal of joint family continues to dominate the thinking of people in India and that this ideal has not been displaced till now.⁴⁷² In other words, for the authors the main concern is

⁴⁷⁰ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. The authors state

While familial ideology once operated to preclude any recognition of employment or violence as political issues, in the hands of the Hindu Right, this familial ideology is being deployed to ensure that attention to these issues does not challenge the centrality of the patriarchal family. It is the very ideological stronghold of the family that allows and shapes the way in which women within the Hindu Right to take up women’s rights issues. Issues like violence and employment are articulated within the legal discourse of rights, without fundamentally challenging or displacing this familial ideology. The way in which the Hindu Right has begun to appropriate women’s issues is thus illustrative not only of the elasticity of familial ideology, but also of its resilience. The legal discourse of equality does not challenge or displace this familial ideology. Rather, familial ideology continues to provide the discursive framework within which the equality rights are given meaning. In the context of the Hindu Right, and its particular approach to equality as harmony in difference, familial ideology continues to shape the understanding of gender difference. Women continue to be constructed as naturally different- as dutiful wives and self sacrificing mothers- and according to the harmony in diversity model of equality, these differences must be respected and celebrated. Familial ideology and the harmony in diversity model of equality are mutually reinforcing in the gendered discourses of Hindutva. Women’s issues can thereby be recognized and addressed in ways that not only do not challenge the family, but which ultimately reinforce its ideological hegemony. (At p. 273)

⁴⁷¹ *ibid.* Kapur and Cossman note,

Women may work outside of the home- but their identity remains first and foremost as wives and mothers. And as wives and mothers, women are the guardians and purveyors of Indian tradition and culture. The Hindu Right is attempting to reconstitute an identity for women that firmly reinscribes women’s roles within the family, while embracing the demands of contemporary consumer capitalism and global economic restructuring. (At P. 269-270)

The Hindu Right’s discourse on women and equality can be seen as an effort to contain the challenge that this renegotiation presents to the traditional patriarchal family. (At P. 271)

⁴⁷² *ibid.* (At p. 94)

that the ‘joint family continues to dominate the way in which people think about family’. The authors note,⁴⁷³

Notwithstanding the important demographic variations in the ways in which people live in families, the joint family continues to be the dominant conception of family, and the dominant way in which people define their family, regardless of its lack of correlation of their own domestic arrangements. The subjective attitude towards family bonds and responsibilities continues to be informed by the dominant discourse of the joint family.

Kapur and Cossman also quote other authors to show the adherence to the idea of a joint family in India. They quote from an author:

Indeed, even where the traditional joint family system breaks into nuclear units, it has given rise to a modified or new type of joint family system. It merely breaks structurally, whereas functionally and sentimentally, individual units continue to form part of joint family.⁴⁷⁴

They also have taken note of the fact that the preference for a joint family may be deep rooted as it has a relation to a worldview, to the way people see the world. They quote from an author who stated that, “the Hindu joint family is a familial group and at the same time, a category of thought, a way of seeing the world and of organizing it so to give it meaning.”⁴⁷⁵

While *Subversive Sites* makes all the efforts to establish that joint family- the ties associated with it, continue to be the way people think about family in India, strangely enough⁴⁷⁶, there are no efforts in this work to understand the factors or the

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid.* At pp. 94-95. Quoted from Promilla Kapur, ‘Women in Modern India’, in Man Singh Das and Panos B. Bordis, eds. *The Family in Asia* (New Delhi: Vikas Publishing House 1978) 108 at 139

⁴⁷⁵ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 96, emphasis added by the authors) quoted from Roland Lardinois, *Family and Household as Practical Groups: Preliminary Reflections*, in K. Saradamoni, ed. *Finding the Household: Conceptual and Methodological Issues* (New Delhi: Sage 1992) at p. 43

⁴⁷⁶ In the process of supporting their argument that amidst diversity of family forms it is possible to identify one familial ideology that dominates the legal system in India, Kapur and Cossman

reasons which can be responsible for such a preference. Neither do the authors see any kind of value in such a preference for joint family in India. Hinting that this preference for joint family may be result of mere 'ideological domination' by men Kapur and Cossman state

The familial ideology continues to have resonance because it is partially constitutive of individuals' identities within their families. It is in and through this familial ideology that women's and men's gendered identities within the family are constructed. It is through this ideology that women, despite their differences, are constituted as mothers and wives. Familial ideology operates to obscure women's differences of class, caste, ethnicity, and to constitute women as homogenous.⁴⁷⁷

Kapur and Cossman differ from colonial rulers as they are not inclined to link the preference for joint family among Indians to Hindu religion, nor do they want to give it any ancient roots. According to the authors the ideal of joint family is something which can be traced only to the 18th or 19th century, when it was brought into prominence by colonial administrators like Henry Maine. Despite the fact that the authors quote from a source which linked joint family to the worldview of people, yet the suggestion in the work is that it dominates the thinking of people across all religions because the legal system in India since colonial era is imposing this ideology on all groups, irrespective of caste, class, religion or ethnicity.⁴⁷⁸ Moreover, the authors are very much on board with the colonial administrators as they emphasize oppressive nature of the institution of joint family. Perceiving joint

suffer from a strange dilemma. On the one hand they do not want to point out any element, which though having origins in Hindu religions/traditions, can be considered as common to whole of India, irrespective of religion or ethnicity. On the other hand for the sake of their argument they need to prove that there is ideological domination of Hindu majority and the domination is to such an extent that all people irrespective of religion or community follow Hindu elements.

⁴⁷⁷ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 95)

⁴⁷⁸ *ibid.* Authors note,

Representations of family, which we refer to as dominant familial ideology, are partially constitutive of the family structure itself. Familial ideology continues to have resonance because it is partially constitutive of individuals' identities within their families. It is in and through this familial ideology that women's and men's gendered identities within the family are constructed. (At p. 96)

family as nothing more than an instrument in the hands of men to sustain unequal and gendered power relations, the authors state,

It is in and through this dominant familial ideology that the complex and unequal relationships between the intermarrying families is constituted and reproduced- that women are transferred away by way of gift from their birth families to their marital families. And within this, process, women are not only constituted as economic dependents to be transferred from one family to another, but this dependency is presented as ‘natural’ consequence of the ‘natural’ roles. It is through this familial ideology that unequal gender relations are constituted and sustained, naturalized and obscured.⁴⁷⁹

Therefore, far from offering any means to go beyond the opposition between tradition and modernity, ‘*Subversive Sites*’ reads like a piece of work where every reference to traditions in support of rights of women is suspect or an attempt to locate rights of women in traditions is suspect.⁴⁸⁰ Very much like the scholarship in pre-1990s era, this work also does not see any possibility of confluence between tradition and modernity.⁴⁸¹ While scholars claim that they want women’s contribution in family to be recognized, but any kind of assertions that such contributions have always been recognized and even celebrated in the indigenous traditions is to be seen as an attempt of traditionalists to relegate women only to the roles of wives and mothers. Traditions, the authors highlight throughout the book, are about family. Importance to family, according to Kapur and Cossman, implies oppressing women under the cloak of celebrating given, pre-defined roles of women as wives and mothers.

⁴⁷⁹ *ibid.* (At p. 96-97)

⁴⁸⁰ *ibid.* Trying to highlight that the sole concern of traditional forces is to keep women confined in the bounds of domestic sphere Kapur and Cossman state,

“The concern with the indecent representation of women can be seen as a contemporary form of resistance to the incursion of western culture- where women and women’s bodies remain the repositories of tradition; where these bodies must be protected from western corruption. The opposition to sexualized representations of women is part of this resistance to the westernization of women. And the need for the protection of women is only heightened with the increasingly visible role of women within public sphere. It is part of the ‘modern but not western’ identity that is being constituted for women.” (At P. 272)

⁴⁸¹ One of the main concerns of the authors in this work is Hindu right’s efforts to locate rights of women within traditions, to find a confluence between emphasis on role of women as wives and mothers and their rights in public sphere.

4.1.3 Law- A Process to Eradicate Cultural Diversity

The current streams take a distinct break from the earlier streams as they no longer accept the idea of law as neutral, objective and rational entity which is separate from society. As pioneers in this direction, the authors like Kapur and Cossman have suggested useful notions such as ‘law “as a process”, “as a discourse”, “as a site of discursive struggle” or “as a site where alternative visions of the world have to be fought”’, to explain nature of the law in contrast to its earlier perceptions, where it was seen as an instrument of social change.⁴⁸² These emerging understandings in the recent works are indeed very valuable as they recognize two important facts: first, that the law exists in close connection with society and its cultures, and second, that a society consists of people/groups of people with alternate visions of world whose voices would be heard in a polity and its legal system.⁴⁸³

The above-mentioned shift, especially the changing perception about nature of the law in the post-1990s phase, is a significant change. It is a shift with immense possibilities to go a long way in the direction of addressing the antagonistic relationship between law and cultural diversity. However, unfortunately in India the realizations about close connection between law and its cultural moorings has not resulted in emergence of any constructive solution to address the antagonistic

⁴⁸² One of the pioneering feminist works in the West espousing the idea of ‘law as a site of struggle’ is Carol Smart, “The Woman of Legal Discourse,” *Social and Legal Studies* 1 (1992): 29–44. She states, the entry of feminists into law has turned law into a *site* of struggle rather than being taken only as a *tool* of struggle. (At p. 30) Also see Frug, “A Postmodern Feminist Legal Manifesto (An Unfinished Draft).” For suggestions to use law as process in Indian context see Rudolph and Rudolph, “Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context.” Extending idea of law as process to uniform civil code, the authors state,

We have suggested that a uniform civil code can be conceptualized as a process rather than a specific outcome, a process in which legal uniformity and legal pluralism jockey for dominance, not for the whole field. (At p. 56)

Another important pioneering work in India which has suggested the idea of law as process is Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 292)

⁴⁸³ For an insightful discussion on importance of different perspectives for a legal system see Minow, “Justice Engendered.” Emphasising the importance of different perspectives prevalent in society even in the world of law Minow writes,

Justice depends on the possibility of conflicts among the values and perspectives that justice pursues. Courts, and especially the Supreme Court, provide a place for the contest over realities that govern us- if we open ourselves to the chance that a reality other than our own may matter. Justice can be engendered when we overcome our pretended indifference to difference and instead people our world with individuals who surprise one another about difference. (At p. 74)

relationship between law and cultural diversity. Convinced that non-western cultures are sources of oppression of women, the role of law, even in this new phase, continues to be the same: to neutralize the influence of religions and cultures from society and to introduce the value of 'individualism' in Indian society.

It is true in the contemporary works law has also been displaced from the position of only normative discourse in society as feminist scholars. In prominent legal feminist works the law is one amongst many normative discourses which influence and govern relationships and behavior in society.⁴⁸⁴ Moreover, the current scholarship differs from the earlier streams as scholars do not any longer accept the simplistic understanding that mere secularization of laws would be sufficient to eradicate influence of traditions. Current legal scholars criticize the earlier scholars for reposing too much faith in potential of law or focusing excessive energies on legal reforms, believing law as an objective gender neutral force which can bring about social change. Current streams of works are no longer inclined to accept simplistic explanations for persisting gap between the 'law in books' and 'law in practice' or between the 'state law' and 'people's law'. For long scholars in India, perceiving law as an objective, autonomous force, were willing to attribute limitations of law in displacing traditional values to the stranglehold of religion or traditions based values on society.⁴⁸⁵ The current scholarship surely makes an advance over earlier streams by rejecting above mentioned simplistic explanation for continuing influence of traditional values on society. Instead, scholars in recent years have given very cogent descriptions about how apparently secular norms get meaning in the process of implementation and how these norms, though having an appearance of neutrality, are influenced by the ideology or the values that are prevalent in the society.⁴⁸⁶ There is also an important shift in direction of making legal scholarship interdisciplinary⁴⁸⁷ as well as practice oriented as they exhort feminist legal scholars and

⁴⁸⁴ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. Parashar and Dhanda, *Redefining Family Law in India*. (At p.xi)

⁴⁸⁵ *Supra* chapter 3.

⁴⁸⁶ *Supra* chapter 3.

⁴⁸⁷ Parashar and Dhanda, *Redefining Family Law in India*. (At p. xii)

activists to shift their focus from law reform, to two other tasks- litigation strategies and legal literacy.

While above differences make the current streams of works appear very different from the pre-1990s scholarship, but none of the above has meant emergence of any constructive solution to establish a harmonious relationship between law and cultural diversity. The only constructive solution that emerges is the suggestion that scholars and activists should not rely excessively on the instrument of law for social change.⁴⁸⁸ However, it is anything but a new revelation that law alone cannot be the precursor of social change. Discussions about limits of law, about the necessity to focus on other social and educational means was as central to the colonial discourses or to the scholars in the pre-1990s phase,⁴⁸⁹ as it is to the contemporary scholarship.⁴⁹⁰ Colonial rulers indeed imparted an important role to law as they were convinced that ‘severe schoolmaster in form of law’⁴⁹¹ was necessary in India. Furthermore, there was also existing a school of thought amongst colonial rulers which believed that a ‘Golden age of British India’ could be delivered through direct frontal attack by state-made laws. However, this school of thought co-existed with those who believed in ‘subtle conquests of mind’ through social means such as education, which could remove natives’ false consciousness, could make them realize ‘degenerate nature of their civilisation’. Colonial rulers were well aware that demand for change should arise from the natives themselves and they made efforts to ensure that focus can also be maintained on social, economic and political discourses so that demand for change can arise from natives themselves. In India, colonial rulers refrained from secularization of the sphere of family only on the basis of the understanding that law should not be used as an instrument of change at least in the personal matters. No reforms in the personal matters were introduced till the demand for the same was raised by the natives themselves even if that meant only a small section of ‘enlightened elite’ amongst natives.

⁴⁸⁸ *ibid.*

⁴⁸⁹ *Supra chapter 3.*

⁴⁹⁰ *Supra chapter 2.*

⁴⁹¹ Stokes, *The English Utilitarians and India*. (At p. 59)

Furthermore, the acknowledgement that law is one amongst many normative discourses in society has not led to any concern for due recognition to all discourses, legal, social, religious, cultural as authoritative discourses in society. While law can be considered as the 'most authoritative discourse' being backed by the coercive power of the State, for socio-legal discourses in India, law apart from being authoritative, is also to be seen as 'a superior discourse'- being the only one having the potential to displace traditional values and introduce new values of 'secularism', 'individualism' and rights of women. The insightful critique of modern law, of human rights enterprise, does not in any way mean re-valorisation of the indigenous understanding of law, or traditional, pluralistic methods of dispute resolution.

Kapur and Cossman assert that the state legal machinery, even if deprived of its universal, principled and value-neutral stand, maintains a distinctive place and importance in contemporary social order. It maintains its 'particularly potent ability' to shape the understanding about who we are, how we ought to live and how to understand the world that we live in. They further suggest that amidst the awareness that law is an important site of politics and that legislations and judicial decisions are product of political struggles between 'fully contestable and temporally bound normative visions of the world' it has to be accepted that law is not 'simply reducible to politics'. According to these authors it has to be believed that state law even while being embedded in ideology and politics is relatively autonomous from other branches of the state, that its claims of 'objectivity and universality are not entirely fictitious' as

It cannot be denied that law has its own discursive claim to truth, and its own institutional structures in which this discourse is embedded. It is this distinctive nature of law and the distinctive way in which law operates as a terrain of political and discursive struggle that must be focus of feminist studies.⁴⁹²

Law reforms, the authors like Kapur and Cossman rightly argue, are important for their symbolic value, for the opportunities they offer to women to come together and

⁴⁹² Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 42)

articulate their claims.⁴⁹³ However, there is no doubt that women have to come together to fight against traditions. The State and its legal order are seen to be important as they seem to have offered many possibilities to women to challenge traditional social and legal order, and the traditional ways in which women are constituted in and through family. The fact that legislative changes have not been successful in bringing about significant change in women's lives, it is argued, should not overshadow the symbolic contribution that these legal reforms have made by articulation of new social values and norms. Kapur and Cossman suggest that the past experience of abuse of humanitarian rhetoric by dominant patriarchal groups should not eclipse the fact that it is this rhetoric which carries potential for liberation of women and other weaker sections since

In order to sustain its legitimacy, the rule of law must appear to be equally applicable to all of its subjects. The principles of equality before the law and of equal protection of the law must be accessible to all legal subjects, including those subjects who are members of socially disadvantaged groups. These values of legal liberalism create law's counter hegemonic potential. Women, colonised people, lower castes and other historically disenfranchised peoples have been able with some degree of success to appeal to legal discourse, to legitimise and realise their struggles for inclusion.⁴⁹⁴

With the suggestion to extend feminists engagements from legal reform to litigation and legal literacy, scholars and activists, including activist lawyers, undoubtedly are now expected to a more expansive role. However, but for this change in the magnitude, the nature of the task of these legal actors is the same: efforts for eradication of the influence of traditions from society. The above task, however, is to be realized through efforts which are not restricted to legal reforms. Emphasizing on the more expansive role of law Kapur and Cossman state,⁴⁹⁵

⁴⁹³ *ibid.* (At pp. 314-322); Also see Choudhury, "(Mis)Appropriated Liberty."

⁴⁹⁴ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 41). Also see, Arvonne S. Fraser, "Becoming Human: The Origins and Development of Women's Human Rights," *Human Rights Quarterly* 21, no. 4 (1999): 853-906.

⁴⁹⁵ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 330)

Law, as an ideologically dominant discourse, plays an important role in constituting and legitimating unequal power relations. Legal subjects are individual citizens, with individual rights and responsibilities, subject to the rule of law. To what extent does legal literacy become part of the Enlightenment project of law, that is, of constituting the subject as a legal subject, endowed with individual rights and responsibilities? Legal discourse constitutes women as right bearers. It is a discourse deeply imbued with liberalism, which constitutes subjects as individuals. This is its radical potential, since *women have never had rights, and never been individuals*. (emphasis added)

Being convinced that importance given to the institution of family in India is result of ‘ideological determination’ by Hindu majority and that this has been possible through legal discourses, Kapur and Cossman expect feminist scholars and activists to use the legal discourse at all three levels- legal reforms, litigation and legal literacy to undo this ‘ideological determination’ exercised by Hindu majority. It is suggested that feminists should engage with law at each of these levels in order ‘to transform the meaning of equality, gender and gender difference’. In view of these authors, legal academics and activist lawyers in India should use each occasion of engagement with law- mobilising people for law reform, or organising legal campaign, or bringing a litigation, or conducting legal literacy programmes- to fight against ‘ideological determination’, for ‘consciousness raising’⁴⁹⁶, and for raising public awareness of discrimination and oppression in name of tradition. An essential component of consciousness-raising programmes has to be to teach participants about legal machinery, to help them gain access to justice while keeping them aware of hegemonizing nature of the legal discourse. Kapur and Cossman note,

⁴⁹⁶ For detailed discussion on ‘consciousness raising’ as a feminist method see Katharine T. Bartlett, “Feminist Legal Methods,” *Harvard Law Review* 103 (1989): 829–88, Defining consciousness raising Bartlett states,

Consciousness- raising is an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences. (at p. 864)

Also see Cotterrell, *The Politics of Jurisprudence*.

Women must be taught about law, without becoming subjects of law. Women must be taught to think critically about legal discourse, and not simply to see the world through the lens of this discourse.

It is argued that academics and activists in India have to use occasions of engagement with law for creating awareness amongst women, especially amongst women from lower castes and minority women that notions of Indian womanhood, of distinct and unique Hindu identity are nothing but mere colonial constructs, forged by the dominant sections (upper caste groups) of the majority Hindu community in order to perpetuate sexual and moral control of women and minority groups. Feminists have to assume the responsibility to reveal to the common women how recent and modern is the supposedly ancient cultural and intellectual heritage of India, brought into existence only for the purposes of ideological hegemony. Academics and activists have to undertake the task of making women realise that the vision of Hindu family, of the role of women therein which ‘appears throughout the law as self-evident, and beyond question’⁴⁹⁷ are in reality personal viewpoints of Hindu upper caste patriarchal groups who, having been able to seize power, have been enjoying the authority to define ‘legal and political concepts that give meaning to our world’.

It is suggested that women’s organisation(s) should be prepared to play active role in supporting women litigants by designing strategies for bringing litigation, in framing the legal issue, in developing legal argument with the awareness that every individual case may assume national importance and may have a role to play in the political agenda of women’s struggles for social change. It is further suggested that women’s organisation should perceive each litigation as an opportunity for fighting against familial ideology and therefore, while framing legal arguments should choose the grounds strategically in order to avoid reinforcing familial ideology in process of getting desired relief for the litigant concerned.⁴⁹⁸

⁴⁹⁷ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 13)

⁴⁹⁸ *ibid.* (especially chapter 5.)

Opportunities of engagement with law are to be used to arrange for the conditions so that women can raise voice against traditions, the voice which does not find a vent, many scholars argue, as women find themselves forced to constitute themselves in accordance with traditional norms and expectations mainly as a question of survival.⁴⁹⁹ Kapur and Cossman also find role of the activists lawyers crucial as they take note of the fact that a majority of women in India are prone to support familial ideology if not instructed by activist lawyers. It is legal academics and activist lawyers who have to support women with the technicalities of the legal system. Scholars are aware of difficulties faced by women due to highly technical nature of the law, legal procedures, courts and also do appreciate the importance of informal methods of dispute resolution. But, for feminist struggles in India the informal forums for dispute resolution do not seem to be preferred options⁵⁰⁰ as they present danger of reinforcement of familial ideology. Such forums seem to offer to lesser possibilities to challenge familial ideology driven by need to arrive at a compromise, settlement. Despite being highly technical litigation has to be seen as preferred option as possibilities to involve in adversarial procedure and associated legal technicalities, allows more chances for choice of ‘appropriate’ grounds, for ‘adequate’ formulation of litigation strategies, and for involvement of activist lawyers.⁵⁰¹

Also, while law is to be used as a site of discursive struggle where alternate vision of the worlds have to be fought out, for women’s rights scholars, the outcome of the battle is pre-determined- victory of those who endorse feminist vision of the world. The battle is not one for giving a chance to everybody to express their visions of the world and find a possibility for harmonious co-existence. Instead, this is an adversarial battle where the feminist vision of the truth has to emerge victorious and

⁴⁹⁹ *ibid.* (At pp. 298-302)

⁵⁰⁰ Vatak, “Where Will She Go? What Will She Do?”

⁵⁰¹ However, in contrast to this, for critique of adversarial process of litigation as something ‘male’ which does not allow much space for women’s particular life experiences see West, “The Difference in Women’s Hedonic Lives.”; Menkel-Meadow, “Portia in a Different Voice.”

the others have to be deconstructed, destroyed and eradicated.⁵⁰² For example, the prominent works like *Subversive Sites* do not take into account the fact that there can be or there are multiple feminisms or multiple ways of articulating women's concerns or that different women's groups may speak up in different voices. Working on the presumption that in countries like India feminists have a uniform, homogenized vision of the world, 'Subversive Sites', far from offering possibility for co-existence of different visions of the world, is more like a call for destruction of all those visions which do not endorse or conform to above vision. Although the authors nowhere in the work have articulated clearly their 'feminist vision', but it seems to be a vision which, much like colonial rulers and the women and law scholars till 1990s, excludes any possibility of women's empowerment in societies where family is considered basic and sacred unit in society, where marriage can be considered a sacrament and where there is emphasis laid on roles of women as wives and mothers.

While scholars in this phase focus significant energy on demonstrating oppressive potential of law, it turns out that in context of India, law is a site of oppression for not having contributed in pushing Indian society ahead on the scale of progress. In other words, for feminist scholarship in India law is a site of oppression for having supported the concept of family as a basic unit in society. Also, as scholars take up the task of understanding why women's struggles have not been able to change realities of women's lives in India, the conclusion, as the above discussion has shown, is continuing influence of religion on all spheres of life and the fact that family continues to be basic and sacred unit in society.

According to Kapur and Cossman distinctive nature of law ensures that not every normative vision of the world gets a chance in 'discursive struggles for ideological hegemony'. Law's discursive claim to truth, it is suggested, exercises necessary

⁵⁰² For a critique of this feminist lawyers and activists in International discourses too see Engle, "Female Subjects of Public International Law." Criticising the prevalent feminist approaches Engle writes,

Either the advocates maternalistically try to change her mind or they seem to ignore or not believe her desires, often dissipating her by attributing to her false consciousness. Either way, advocates' imagined constructs of her guide her strategies for gaining recognition of women's rights. (At p. 1525)

limits on the feminist requirement to challenge all the meanings dominant in law, thereby ensuring that this challenge ‘does not mean that anything is possible’, or that one can ‘re-define the meaning of gender at will’.⁵⁰³

These scholars also find justification for perpetuation of ethnocentrism invoking the cause of women, on the basis of assumption that sexual, moral and economic oppression of women is inherent in Hindu tradition and Hindu law. For them, much like universalists in human rights discourse, seeking eradication of tradition is a noble cause, a matter of taking firm stand against intolerance, against oppression of women even at the cost of inviting the allegation of ethnocentrism.

4.2 Concern for plurality: Merely an ‘ornamental Concern’

Apart from the above, another important change that has come to characterize women’s rights scholarship in past few decades is: scholars’ disenchantment with legal uniformity or what can be called as increasing sensitivity towards differences among women. This concern has been manifested in the post-1990s scholarship through two important issues- increasing skepticism towards the uniform civil code and growing demand for recognizing diversity of forms in the solemnization of marriages (or adult intimacy).

Apart from taking note of diversity in family forms, another important change which characterizes women’s right scholarship is: shift in perception about the role of the state in regulating family relationships, particularly formation and dissolution of marriage. It is indeed a welcome change that scholars in India, in contrast to the scholarship till a few decades ago, have shown inclination to take cognizance of an important fact: that in India marriages or personal relationships, even Hindu marriages which are presumed to be governed by a uniform law governing all Hindus- the Hindu Marriage Act, 1955, have continued to be purely social/community relationships with minimum role of the state.⁵⁰⁴ Family law scholars like Agnes and Mehra have made a very important contribution as they took

⁵⁰³ Kapur and Cossman, *Subversive Sites Feminist Engagements with Law in India*. (At p. 43)

⁵⁰⁴ For a detailed discussion on this point see Werner Menski, *Modern Indian Family Law*, 1st ed. (Richmond, UK: Curzon Press, 2001) (At pp. 9-35); Menski, *Hindu Law*.

note of the provisions like sections 7 and 29 of the Hindu Marriage Act, 1955 and drew attention towards vivid presence of legal pluralism in solemnization of Hindu marriages.⁵⁰⁵

Women in India have been at the suffering end due to the widely prevalent myth that family laws of Hindus have been moving the linear path of progress, which is presumed to have been followed by family laws in the West.⁵⁰⁶ Women in India have been deprived of their rights and entitlements due to the wrongful belief that the Hindu Marriage Act prescribes some specific religion based forms of marriage solemnization. Women have also had to suffer denial of rights due to the myth that divorce was not available to Hindu women in pre-colonial India.

Apart from taking cognizance of legal pluralism prevalent in solemnization of marriages in India, it is also a positive change that many scholars have taken cognizance of the fact that not only law has not been able to eradicate the practices like bigamy or adultery but the criminalization of practices like bigamy and adultery have also been resulting in denial of rights of women.⁵⁰⁷ Scholars' concern for rights of women in diverse kinds of personal, intimate relationships including in bigamous and adulterous relationships is a welcome change given the fact that judiciary in India has been dealing with such issues right from colonial era. Strong belief shared by scholars and policy makers that prevalence of bigamy was a sign of backwardness of Indian society has not only resulted in denial of rights of women, it has also rendered rights of women subject to individual opinions of the judges.⁵⁰⁸ Agnes also made a very pertinent point when she expressed concern about the fact that polygamy has been used as a tool for attributing backwardness to Muslim community despite the fact that bigamous/polygamous marriages are as much a reality amongst Hindus as it may be amongst Muslims.⁵⁰⁹

⁵⁰⁵ Agnes, *Family Law Volume 1*. (At pp. 21-23); Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. (At p. 21)

⁵⁰⁶ Agnes, *Family Law Volume 1*. (Especially chapter I, pp. 10-40)

⁵⁰⁷ Dhagamwar, "Panch Parmeshwar."

⁵⁰⁸ Agnes, *Family Law Volume 1*. (At pp. 27-30)

⁵⁰⁹ *ibid.* (At pp. 27-29)

All the above insights and concerns amongst scholars regarding role of the state in formation and dissolution of marriages and customary practices are indeed meaningful and pertinent. There is indeed an urgent need to develop a comprehensive legal framework for determining rights and obligations of individuals in personal relationships, irrespective of the form which they choose to adopt in determining these relationships. Courts in India have always been faced with petitions of women in informal relationships claiming rights. There exists important jurisprudence from the Supreme Court as well as the High Courts, wherein judges have taken steps to protect the rights of such women who were in informal relationships, even in technically illegal and legally void relationships.⁵¹⁰ There is indeed an urgent need to develop a comprehensive legal framework for determining rights and obligations of individuals in personal relationships, irrespective of the form which they choose to adopt in determining these relationships. It has been extremely important to save the uniform civil code debate from the binary of backward v progressive, where pluralism, especially legal pluralism, is seen as a sign of backwardness and the uniform civil code is projected as the only reason of hope and sign and symbol of progressiveness- only key to all problems relating to denial of rights of women in the domain of family.

While cause of women's rights in India require all the above steps, the unfortunate situation is that the scholars' increasing concerns about rights of women in pluralistic relationships or challenge to the uniform civil code has not resulted into any efforts to challenge those colonial era presumptions which have responsible for denigration of cultural and legal pluralism in India and for holding Uniform Civil Code as a sign of progress. There are no signs to challenge the presumptions which have been responsible for ill-founded uniform civil code debate.⁵¹¹ Moreover, Scholars' concern for rights of women in diverse kinds of relationships has not translated into efforts from scholars to develop comprehensive legal framework to deal with the rights of women in range of informal relationships including

⁵¹⁰ Agnes, *Family Law II*, 2011. Also see Ruma Pal, *A. M. Bhattacharjee's Matrimonial Laws and the Constitution*, 2nd ed. (Kolkatta: Eastern Law House Pvt. Ltd., 2017); (especially chapter 2, Hindu Law of Marriage At pp. 18-52)

⁵¹¹ *Supra* chapter 2.

bigamous/adulterous relationships. All we have is a series of cases from different High Courts, from judges of the same High Courts, and also from the Supreme Court, which offer conflicting and divergent opinions on the issue of rights of women in such informal relationships.⁵¹² More recently, in 2005 there has been enacted exists a new piece of legislation, the Domestic Violence Act (DVA hereinafter), which can be seen as a concrete result of scholars' concern for rights of women in informal relationships. This Act grants some rights to women who choose to be or find themselves in intimate relationships irrespective of the form used to establish such relationships. However, it is regrettable, as the next section shows, that even this new legislative addition and the judicial opinions thereon have introduced a new dimension to the confusions and lack of clarity that engulfs the said area. And, the responsibility, it cannot be denied, lies to a large extent on nature of socio-legal discourses with emerging concern for plurality without challenging the colonial era presumptions about Hindu marriage.

4.3 Institutions of Marriage and Monogamy in India- Merely Instruments to Impose Oppressive Ideal of Hindu Marriage!

While expressing concern for rights of women in bigamous/polygamous relationships, one of the main concerns of many of the recent works is not to explore the means for regulating the bigamous/polygamous marriages while protecting rights of women. The concern is also not to understand how pre-colonial India or traditional societies could find the balance between the ideal of monogamy and accommodating the reality of bigamous marriages. Far from being a scholarship which offers guidance on how to regulate polygamy most of these works seem more concerned about, (i) defending or supporting the practice of bigamy/polygamous marriages as a sign of sexual autonomy, or (ii) revealing the fact of prevalence of bigamy amongst Hindus⁵¹³ or (iii) even establishing monogamy as a highly

⁵¹² For a detailed discussion on this point see: Agnes, *Family Law Volume 1*. Also Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*.

⁵¹³ Nivedita Menon, "Uniform Civil Code – the Women's Movement Perspective," October 1, 2014, Menon cites a sociological survey to show prevalence polygamy amongst Hindus Sociologist Nirmal Sharma points out that while a Hindu man will desert his lawfully wedded wife to live with another, the multiple wives of Muslim men are entitled to equal legal and social

patriarchal device which has been used by orthodox societies to exercise sexual domination on women.⁵¹⁴ For contemporary scholars emphasis on monogamy is nothing more than a negative effect of modernization, propagated either by those trying to impose *Brahmanical* values on Indian society or by the ethno-centric English educated elite.⁵¹⁵ Monogamy, some scholars have been of the view, has just been an instrument to determine and impose the idea of good and bad intimacies on individuals.⁵¹⁶ Finding even women's movement' support to the ideal of monogamy

rights. "Closet bigamy in Hindus is worse than open polygamy among Muslims,". (emphasis original)

Also see Menon, "It Isn't about Women."; Flavia Agnes, "From Shah Bano to Kausar Bano: Contextualising the 'Muslim Woman' within a Communalized Polity," in *South Asian Feminisms*, ed. Ania Loomba and Ritty Lukose (USA: Duke University Press, 2012), 33–53. Drawing attention towards prevalence of polygamy and other anti-women practices amongst Hindus Agnes writes,

The rhetoric conveniently overlooks the fact that abandonment and destitution of wives is as rampant among Hindus; that the matrimonial faults of adultery and bigamy are evenly distributed across communities and that Hindus, Christians and Parsees, with equal zeal, guard the patriarchal prerogatives within their respective personal laws. Further, that around 80% of all women burnt in their matrimonial homes are urban middle class Hindus! (At p. 33)

⁵¹⁴ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Expressing concern for rights of women Mehra states,

The reluctance to even debate monogamy has only served to privilege the rights of one woman over another, similarly placed woman. The popular discourse on monogamy typically assumes that monogamy is safe for women and is a less contentious matter for the rights enforcement system to handle because it is legal and normative and is an ideal family form (despite the countless cases that show that monogamy is as unsafe and as contentious for claiming rights.) (p. 77)

⁵¹⁵ *ibid.* Presenting monogamy as a negative effect of modernization Madhu Mehra writes,

Today multiple marital relations are perceived by younger generation as moral transgression practised by those who were poor and illiterate and by those who lacked modernity, as they prefer monogamous marriage and lifelong unions. (At p. 50)

She further mentions,

Attitudes towards bigamy and polygyny have changed since the late 1970s, not only as a result of the law and as a result of conflating education with brahmanical values, and of conflating non-monogamous conjugal traditions with signs of being uncivilized. (At p. 51)

⁵¹⁶ *ibid.* Making a case for rights of women in bigamous/polygamous relationships the authors of the Resource Book state

Our anxieties as social workers and rights advocates on this subject are whether recognition of rights will loosen the restrain on men's sexual desires, disrupt families, and increase patriarchal exploitation of women. This fear overlooks the fact that monogamy is equally patriarchal. It also overlooks the fact that non-monogamy in its customary, contemporary, and emerging forms is widely prevalent despite law. (At p. 40)

ill-founded⁵¹⁷ and expecting that law will not ‘privilege monogamous relationships’ the authors in a Resource Book on rights of women in intimate relationships state,⁵¹⁸

The debates on monogamy tend to be limited to male monogamy, which is perceived as fundamental to securing the dignity and rights of the legitimate wife. Consequently, enforcement of rights for woman is conditional upon her being a wife, or a ‘legitimate’ rights holder, as distinct from an illegitimate claimant. The support for monogamy, however, goes beyond its instrumental value in the determination of rights, in terms of intrinsically defining ‘proper’ intimacy. Indeed, monogamy has captured our collective imagination as feminists so greatly that exclusivity has come to define even non-normative intimacies, so that rights are imagined and articulated only vis-à-vis one another.

While there are hardly any scholarly inputs for rights of women in bigamous relationships, the concern for rights of women in informal relationships or the relationships which came to be declared as illegal in the process of ‘modernisation’ and ‘codification’ of family laws of Hindu community, is also not about understanding the phenomenon of legal pluralism in Hindu marriages. Realization amongst scholars about plurality of marriage forms available to Hindu women has not resulted into scholarly efforts to understand how traditional India protected rights of Hindu women who chose to be or happened to be in different kinds of

⁵¹⁷ *ibid.* Finding support offered by liberal feminists to monogamy problematic Madhu Mehra writes,

[This approach to monogamy] shapes the liberal feminist approach to rights in marriage, where only ‘good’ women are viewed as holding entitlements, and assumes often that, in fact, good women have it in them to make ‘good’ men too. (At p.36)

Also see Agnes, “From Shah Bano to Kausar Bano.” Considering support to monogamy as an modernist, elite practice Agnes writes,

At another level, for the liberal, modern, English educated, middle classes, the demand for UCC is laden with a moral undertone of abolishing polygamy and other ‘barbaric’ customs of the minorities and extending to them the egalitarian code of the ‘enlightened majority’. This position relies upon the western model of nation state and liberal democracy and scorns simultaneous sexual relationships in the nature of polygamous marriages in the name of modernity but at the same time, endorses sequential plurality of sexual relationships (through frequent divorces), and also the more recent trends of informal cohabitations, which have gained legitimacy in the west. (At p. 9)

⁵¹⁸ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*. (At p. 36)

personal relationships, despite being a society where marriage has been considered a sacrament. Instead, one of the major concerns of scholars seems to be to deconstruct the idea of marriage as sacrament or prove it as a highly oppressive, anti-women ideal.

While scholars now accept and acknowledge the fact that colonial rule had an impact of killing flexibility inherent in customs by imposing a strict and rigid definition of proving custom, there is not much concern about the issues such as, what these customs relating to marriage were; how they did relate to the traditional institution of marriage and how could they co-exist with the ideal of marriage as sacrament. There is hardly any discussion in the mainstream literature that wrongful imposition of artificial and hitherto unknown labels of ‘legal’ and ‘illegal’ or ‘formal’ and ‘informal’ on range of intimate relationships, resulting into denial of rights of women is a gross misunderstanding about the traditional institutions of marriage and pluralism inherent in it. Realization that there existed diversity of marriage forms in pre-colonial India and that colonial rule became a means for emergence of a narrow definition of marriage by privileging only one, presumably scripture based *brahmanical* form of marriage solemnization over the others, has also not resulted into efforts to understand the reasons which made co-existence of various forms of marriage solemnization possible. In recent years there have emerged scholarly insights which see customs as progressive and in favour of women’s rights, but a closer look into the literature suggests that customs are to be seen as progressive for not giving importance to the institution of family or to the idea of sanctity of marriage or for having possibilities for easy divorce or dissolution of marriages.

Instead of challenging the colonial era practice of reducing Hindu marriage to a specific ritualistic form of marriage, most of the scholarship in the new phase, ironically enough, appears more concerned about proving Hindu marriage as a uniform, homogenous institution rather than a pluralistic institution embodying diverse forms. Convinced about the fact that religions or traditions deny rights to

women in what are seen as ‘non-normative relationships’, the main question for the authors of the Resource Book is⁵¹⁹

Should public policy be based on morality derived from religion or on morality derived from abstract ideals of good and bad conduct? Or should, it instead be derived from a political understanding of power and inequality in every context?

Current scholars do differ significantly from the scholarship in the earlier streams as reform of family laws to grant equal rights to women in the matrimonial relationships is not their main priority. Instead, one of the important concerns of the scholars in the new phase is to ‘challenge or de-center marriage’, to question the idea of privileging marriage as a site of sexuality. However, apart from above difference, scholars in current phase are on board with the scholars in the earlier streams, as the larger concern, instead, continues to be to prove the Hindu ideal of marriage as sacrament as a highly patriarchal and oppressive concept which has been responsible for denial of rights to women in matrimonial relationships.⁵²⁰ Instead of efforts to challenge the opposition between the idea of sanctity of marriage and rights of women, what we have is a scholarship which seems to be driven largely to deconstruct the idea of marriage as sacrament as an ancient ideal at all.⁵²¹ Attempting to trace the roots of the above ideal only to the colonial era, the

⁵¹⁹ *ibid.* (At p. 43)

⁵²⁰ Menon, “It Isn’t about Women.”

⁵²¹ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*. Providing a review of how different women’s organisations have been addressing the issue of rights of women in different kinds of intimate relationships authors of the ‘Resource Book’ seem to lament the fact that,

The debates that question the primacy of marriage, or those that attempt to subvert the normative family by including non-normative and transgressive family forms, remain few and far between. For the most part, our work in relation to advocacy and community programming has not attempted to challenge or de-center marriage. (At p. 33)

For the authors of the Resource Book, the main goal therefore is,

The goal remains- in terms of advancing equality and non-discrimination within the family, as much as in the terms of making rights in the family available to all families, regardless of marital status or sexuality. The advancement of these goals necessitates challenging the ideological beliefs that justify a marriage-centric rights framework while demonizing non-marital relationships. Such a challenge requires acting on many levels simultaneously- by giving visibility to all those who live on margins, by critiquing the norms on which privilege and stigma are based, and by demoting the normative by making marriage available for non-normative. While this may not radically transform the privileging of dominant family forms, the processes

scholars in the new phase, do not give signs to challenge the colonial era practice of perceiving traditional institution of marriage as an 'anti-women institution'. Instead of challenging the binaries of sacrament v contract or traditional v modern institution of marriage, what we have is scholarship with a new binary of upper caste Hindus v lower caste Hindus, wherein ideas of marriage as sacrament or sanctity of institution of marriage and family are nothing more than mere upper caste constructs. Despite being concerned about politicization of rights of women, main thrust of most of the recent literature is to establish how dominant Hindu majority or the upper caste Hindus have been imposing the regressive ideal of marriage as sacrament on the lower castes or even on those sections of population from minority religions where marriage has never been a sacrament.⁵²²

While scholars take cognizance of the fact that modernization of Hindu law has not been able to displace the idea of marriage as sacrament, the larger concern is not to understand the reasons for the above situation. Instead, most scholars seem to repent the fact that the Hindu ideal of marriage as a sacrament continues to be a dominant idea even in post-independence India not only for majority of the population, but also for the legal system and the judges⁵²³. Scholars seem more concerned about challenging the very idea of privileging marriage as a site of sexuality,⁵²⁴ seeing it as a sign of patriarchy⁵²⁵ rather than finding means about how it can be possible to

of engaging in debate, bringing visibility to non-normative family forms, expanding rights, imparting rights education, and adopting new approaches to case work can make the practices of transgressing the norm more acceptable. (At p. 78)

⁵²² Kapur, "The Tragedy of Victimization Rhetoric," 2002.

⁵²³ Flavia Agnes, "Controversy over Age of Consent," *Economic and Political Weekly* 48, no. 29 (2013), <http://www.epw.in/journal/2013/29/commentary/controversy-over-age-consent.html>.

⁵²⁴ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family*. Considering emphasis on heterosexual marriages as sign of patriarchy the Resource Book states,

Heteronormativity also intersects with and sustains other context-specific, cross cutting systems of power, besides patriarchy, such as caste, class, and religion. From a political standpoint, therefore, it is not enough to address heteronormativity by merely supporting all sexual preferences, for this alone does not fully challenge the web of power it creates. Indeed, it is just as important to question all interlinked systems of power, and to simultaneously support intimate relationships and sexualities that transgress or subvert institution of marriage, procreative sex, and partiliny. (At p. 33)

⁵²⁵ *ibid.* Madhu Mehra writes

Although marriage has long been critiqued in women's studies for institutionalizing patriarchal control over women's sexuality and their reproductive labour, such critical perspectives are not

protect rights of women without deconstructing the traditional ideal of marriage as sacrament. There are hardly any efforts to develop legal framework for rights of women in diverse forms of intimate relationships which came to be seen as illegal relationships as a result of ill-conceived colonial era mis-conceptions about understanding of Hindu marriages. Attributing continuing perceptions of marriage as a sacrament either to 'false consciousness' or to 'ideological domination' of women by the 'Hindu Right', recent scholarship in India far from challenging the binary opposition of sacrament v contract scholars seem to repent the fact that the Indian legal system and the judiciary has not been able to treat marriage or intimate relationships as mere contractual relationships. Expectations from the state and its legal system, and especially from the judiciary are to ensure two things, first that the marriage is not privileged as a site for protection of rights of women and second that all kinds of intimate relationships, including marriage, come to be seen as mere contracts governed by the will of the individuals concerned. For example, according to the authors of the Resource Book, cause of rights of women in diverse kind of intimate relationships, requires

Activism must aim to shift the fulcrum on which rights are articulated and imagined from marriage to the household, *from legality and the nature of kinship ties to the years spent together*.⁵²⁶ (emphasis added)

For protecting rights of women in diverse kind of relationships, according to the authors of the Resource Book, the requirement is the following,

The new frameworks need to go beyond the liberal model of state feminism, where new rights are added to the existing family structure, or indeed where a few diverse family forms and a few women on the margins are 'added and stirred' into the existing framework. It needs to question and break the norms that privilege marriage, for today marriage is not simply one amongst other options. It is the only option where rights are recognized. For a rights framework to be transformatory, it needs to go beyond being inclusive- to

adequately manifested in programmes, campaigns and debates in the women's movement in India. For instance, marriage is made compulsory for women by mutually reinforcing values that bestow social status upon women only upon marriage, coupled with disincentives for single women. (At p. 31)

⁵²⁶ *ibid.* At p. 78

displacing norms that privilege marriage, chastity, monogamy, and heteronormativity, norms that privilege a few women- and go beyond attempts to make rights conditional upon compliance with these norms.⁵²⁷

While being concerned about granting rights to women in what are addressed as ‘non-normative marriages’, two things have completely been ignored, first, that co-existence of what can be called ‘normative’ and ‘non-normative’ marriages is an ancient phenomenon and second, that denial of rights to women in diverse kinds of relationships is only a colonial legacy in India, resulting from distortions and misunderstandings about the concept of *dharma* and about institution of marriage and family in pre-colonial India. It has also been ignored that what are called common law marriages is not only an ancient phenomenon, and that this kind of marriages have always had recognition in the Indian legal system.⁵²⁸ The ‘Resource Book’ is concerned about protection of rights of women in diverse kinds of intimate relationships, especially in those which have not been able to meet the test of legally valid marriage under the Hindu Marriage Act 1956, or what are commonly referred as live-in relationships, addressing the latter as non-normative marriages.⁵²⁹ According to the authors of the Resource Book, the three broad categories in which the law places non-normative relationships are customary, common law, and illegal.⁵³⁰ However, for the authors of this work, the concern to take distance from traditions seems to be so strong that they completely obscured the fact the Hindu law, that is, the Hindu Marriage Act and other laws, pre-reform as well as post-reform, has been granting rights to women under all the above three categories of non-normative relationships. It completely obscures the fact that under the existing Indian marriage laws, women could enjoy status and rights of wife even in those relationships which would otherwise be called mere co-habitation arrangements for want of formal solemnization of marriage.⁵³¹ While authors of the Resource Book are right in pointing out that the rigid and difficult definition of proving custom has been detrimental to the cause of women’s rights, what has been ignored by scholars

⁵²⁷ *ibid.* At p. 85

⁵²⁸ Menski, *Modern Indian Family Law*, 2001. (At pp. 9-20);

⁵²⁹ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*.

⁵³⁰ *ibid.* At p. 41

⁵³¹ *Infra*, section 4.4.

in this work that despite this difficulty the Courts in India have been recognizing relationships as marriage even where no custom has been followed.⁵³²

Most of the works advocating concern for rights of women in diverse intimate relationships have obscured the fact that in India formal solemnization of marriage is not the criteria for distinguishing between marriages and relationships in nature of marriage. The courts have often invoked the provision of presumption of marriage to validate a long co-habitation between a man and a woman as a legal marriage and to grant status and rights of wife to the woman concerned.

What has further been ignored is that one of the peculiar features of Indian marriage laws, especially of Hindu marriage laws, is recognition to diverse forms of customary marriage solemnization⁵³³ and wide discretion enjoyed by the courts in determining the issues relating to formal validity of marriages.⁵³⁴ And, that scholarly reluctance to take cognizance of above elements has serious consequences for the cause of women's rights in India is becoming evident from the functioning of the Protection of Women from Domestic Violence Act, 2005- the statute which has been a manifestation of scholars' increasing concern for plurality.

If one takes a close look at the way this Act has been in put into practice, it appears that in addition to increasing confusions, it has caused a strange and undesirable effect, i.e. revival of the myth of the Hindu Marriage Act as a uniform code of personal law, which prescribes some uniform conditions such as, *saptapadi* or oblations to the fire, for performing/solemnizing Hindu marriages. Promulgation of the Domestic Violence Act has resulted in a situation where not only scholarly discourses but also judicial discourses are perpetuating a set of following wrongful presumptions: (i) that the Hindu Marriage Act prescribes specific formalities and

⁵³² Menski, *Modern Indian Family Law*, 2001. (At pp. 9-20); Menski, "Solemnisation of Hindu Marriages."

⁵³³ Menski, *Modern Indian Family Law*, 2001. (At p. 12)

⁵³⁴ Matrimonial matters in India, as is well known, are governed by four sets of, what are seen as, religion-based personal laws for Hindus (including Buddhists, Jainas and Sikhs), Muslims, Christians and Parsis. In addition to the religion-based laws there also exists a special enactment, named the Special Marriage Act of 1954, which facilitates formation and dissolution of inter-religious marital relationships. These laws prescribe some norms for formal as well as material validity of the marital relationships. There has always been a demand for compulsory registration of marriages, however, in India non-registration does not render a marriage invalid. Section 8, Hindu Marriage Act, 1955

ceremonies for marriage solemnization, (ii) that ‘common law marriages’ or a man and woman deciding to live together in relationships in nature of marriage with very little or minimal formalities is a phenomenon which is new to India and which is a result of modernization and changing social context,⁵³⁵ (iii) that the Indian legal system has come to grant rights to women in various kinds of informal relationships for the first time through promulgation of the Domestic Violence Act, 2005. In a strange turn of events judges and also scholars and activists seem to have forgotten (i) that the section 7 of the HMA does not limit a valid Hindu marriage to conditions like performance of *saptapadi* or oblations to fire and (ii) that there exists a rich body of case laws granting rights to women in a range of informal relationships.⁵³⁶

4.4 The Protection of Women from the Domestic Violence Act 2005: A New Source for denial of rights to women

In 2005, the Protection of Women from the Domestic Violence Act (the Act) found a place in the Indian statute book as a progressive piece of legislation. Although a law primarily meant to address the issue of domestic violence by women in range of personal, intimate relationships,⁵³⁷ this Act has attracted maximum attention for another reason- for protecting some social and economic rights of women even in those women cannot be termed as a legally valid marriage.⁵³⁸ A much celebrated legislation amongst women’s rights scholars and activists, this Act has been acclaimed as the ‘watershed in our legal discourse’.⁵³⁹ The 2005 Act, which uses the

⁵³⁵ Continuing emphasis by the judiciary, policy makers or even by a section of women’s rights movement on compulsory registration of marriage as a means for protecting rights of women is strong evidence of the fact the prevalence of informal relationships or relationships in nature of marriage has always been prevalent in India.

⁵³⁶ See also, Flavia Agnes, *Marriage, Divorce, and Matrimonial Litigation* (OUP, Delhi, 2011).

⁵³⁷ The Act uses the term, ‘domestic relationship’, section 2(f), the Protection of Women from the Domestic Violence Act, 2005. The term domestic relationship is defined as:

Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

⁵³⁸ Indira Jaising and Monica Sakhrani, eds., *Law of Domestic Violence*, 2nd ed. (New Delhi: Universal Law Publishing Co., 2007). Other laws available in India for protection against violence- 498-A, 304- B, the Indian Penal Code, 1860.

⁵³⁹ Jaising and Sakhrani. (At p. 8) “Domestic Violence and Law: Report of Colloquium on Justice for Women-Empowerment through Law” (Delhi: Lawyer’s Collective, 2010) ; Tahira Karanjawala and Shivani Chugh, “The Legal Battle against Domestic Violence in India:

term ‘domestic relationship’ to cover various kinds of interpersonal relationships wherein women need protection, divides intimate relationships into two categories: “marriage” and “relationships in the nature of marriage”. A manifestation of women’s rights scholars increasing concern for plurality this Act has also come to be seen as a sign of Indian legal system’s recognition of changing social context and values in India. It is projected by women’s rights scholars as a sign of increasing inclination of Indian legal system not to privilege marriage as the only site of sexuality.⁵⁴⁰ Given the fact that this Act uses the term ‘relationship in nature of marriage’ instead of marriage, it is projected as a law which legitimizes ‘live-in relationships’ in India.⁵⁴¹ It is much more expansive in its scope as compared to personal laws⁵⁴² and undoubtedly broader in its vision when it comes to granting rights to women. The Act also appears path breaking since it carries the possibility to grant monetary and social reliefs to women in those relationships, which according to personal laws would otherwise be considered bigamous or adulterous.⁵⁴³

While the Act can be seen as an important milestone in the history of women’s movement in India, one of the important stumbling points for effective implementation of this Act has been lack of clarity about the term ‘relationship in nature of marriage’.⁵⁴⁴ Entrusted with the task of giving meaning to the term ‘relationship in the nature of marriage’, the judiciary in India has been engaged in reflecting on various kinds of non-marital intimate relationships like ‘pre-marital

Evolution and Analysis,” *International Journal of Law, Policy and the Family* 23 (2009): 289–308.

⁵⁴⁰ Mehra, *Rights in Intimate Relationships- Towards an Inclusive and Just Framework of Women’s Rights and the Family*. (At p. 116)

⁵⁴¹ The Act enables the wife or female living in relationship in the nature of marriage to file a complaint of domestic violence under the proposed enactment.

⁵⁴² P.K. Das, *Universal’s Handbook on Protection of Women from Domestic Violence Act*, 2nd ed. (Delhi: Universal Law Publishing Co., n.d.).

⁵⁴³ Agnes, *Family Law II*, 2011. Talking about the Act Agnes mentions, The DVA transformed the yesteryear concubine into present day cohabitees and their right to protection from domestic violence and rights of maintenance and residence have been awarded statutory recognition. (At p. 154)

⁵⁴⁴ Shyam Krishan Kaushik, “A Relationship in Nature of Marriage- Hope and Disappointment,” *Journal of Indian Law Institute* 53, no. 3 (2011): 474–90.

sex’,⁵⁴⁵ ‘one night stands’,⁵⁴⁶ ‘relationships for casual sex’,⁵⁴⁷ ‘living together at times’,⁵⁴⁸ long term and short term co-habitation arrangements. The first authoritative pronouncement by the Apex Court on the meaning of the term ‘live-in relationships’ or relationship in the nature of marriage in the context of the 2005 Act appeared in 2011 in the case of *D. Velusamy*.⁵⁴⁹ This was followed by another judgement in 2013 in the *Indra Sarma*⁵⁵⁰ case.

In the *Velusamy* case, although the petitioner did not invoke the provisions of the 2005 Act, the Apex Court went on to give a specific definition to the term ‘relationship in the nature of marriage, considering that the issue of bigamous or adulterous relationship need also to be examined for the purposes of the 2005 Act. The judges in this case took note of the fact that there can be many kinds of intimate relationships which can be named as live-in relationships. However, striking a distinction between live-in relationships and relationship in the nature of marriage, the judges categorically stated that “not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005”.⁵⁵¹ Enumerating various kinds of live-in relationships, the judges made it clear that one night stand, relationship for sexual services, keeps and concubines cannot be considered relationships in the nature of marriage. Defining the term relationship in the nature of marriage, the judgment stated,

In our opinion a “relationship in nature of marriage” is akin to a common law marriage. The common law marriages require that although not being formally married: (a) *The couple must hold themselves out to society as being akin to spouses*, (b) They must be of legal age to marry, (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried, (d) They must have voluntarily cohabited and held themselves

⁵⁴⁵ *Aysha v Ozir Hassan*, (2013)5MLJ31

⁵⁴⁶ *D. Velusamy v D. Patchaiammal*, 10 Supreme Court Cases 469 (Supreme Court 2010).

⁵⁴⁷ *D. Velusamy v D. Patchaiammal*, 10 Supreme Court Cases.; *Indubai Jaydeo Pawar v Draupada@Draupadi Jaydeo Pawar*, SCC Online 2413 (Bombay High Court 2017).

⁵⁴⁸ *Joby v Elsy*, 3 Kerala Law Times 450 (Kerala High Court 2013).

⁵⁴⁹ *D. Velusamy v D. Patchaiammal*, 10 Supreme Court Cases.

⁵⁵⁰ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases 755 (Supreme Court 2013).

⁵⁵¹ *D. Velusamy v D. Patchaiammal*, 10 Supreme Court Cases. (At para 32)

out to the world as being akin to spouses *for a significant period of time*.⁵⁵²
(emphasis original)

It was further stated,

A 'relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a “domestic relationship”.⁵⁵³

Although the *Velusamy* judgment has invited much criticism, mainly for use of objectionable language,⁵⁵⁴ it remains till date the authoritative pronouncement for the term relationship in the nature of marriage, not having been overruled by a larger bench. Taking further the line of reasoning developed by the Apex Court in the *Velusamy case*, the Apex Court once again explained elaborately the differences between marriage, relationship in the nature of marriage and live-in relationships in 2013 in the *Indra Sarma* case. In this case too the judges made it clear that the 2005 Act does not give legal recognition to all kinds of live-in relationship. The Court specifically mentioned,

Through the DV Act, the Parliament has recognized a “relationship in the nature of marriage” and *not a live-in relationship simpliciter*”.⁵⁵⁵

Marriage, the Court mentioned, “involves legal requirements of formality, publicity, exclusivity, and all the legal consequences flow out of that relationship”.⁵⁵⁶ On the other hand, “relationship in the nature of marriage”, according to the Court, means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.⁵⁵⁷ (emphasis added)

⁵⁵² D. Velusamy v D. Patchaiammal, 10 Supreme Court Cases. (Para 31)

⁵⁵³ D. Velusamy v D. Patchaiammal, 10 Supreme Court Cases.

⁵⁵⁴ Agnes, *Family Law II*, 2011. (At pp. 160-161)

⁵⁵⁵ Indra Sarma v V.K.V. Sarma, 15 Supreme Court Cases. (Para 53)

⁵⁵⁶ Indra Sarma v V.K.V. Sarma, 15 Supreme Court Cases. (Para 23)

⁵⁵⁷ Indra Sarma v V.K.V. Sarma, 15 Supreme Court Cases. (Para 35)

Distinguishing live-in relationship from a relationship in the nature of marriage, the court defined the former as,

purely an arrangement between the parties unlike, a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression “in nature of”.⁵⁵⁸

The judges also laid some guidelines for understanding the difference between marriage and relationship in the nature of marriage. According to the Apex Court, the factors that are to be taken into account for a relationship to qualify as a relationship in the nature of marriage under section 2(f) of the Act are:⁵⁵⁹ (1) reasonably long duration of period of relationship, (2) shared household (3) pooling of resources and financial arrangements in joint names to support each other (4) domestic arrangements or entrusting responsibility, especially on woman, to run the home (5) sexual Relationship, which is not just for pleasure, but for emotional and intimate relationship and also for procreation of children (6) children- having children and sharing the responsibility for bringing up and supporting them, (7) socialisation in public and holding out to the public as husband and wife (8) intention and conduct of the parties- common intention of parties to have a marriage-like relationship.

Taking a clear stand with respect to polygamous or bigamous arrangement the judges in the *Indra Sarma's* case stated:

A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character.⁵⁶⁰

⁵⁵⁸ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases. (Para 36)

⁵⁵⁹ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases. (Para 55)

⁵⁶⁰ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases. (Para 56)

It was further mentioned:

Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.⁵⁶¹

In *Sarma's* case the judges did express sympathy towards those women who knowingly enter into bigamous relationships, however it expressed helplessness as they mentioned:

Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserve protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive.⁵⁶²

Raising a demand for action from the Parliament, the judges further added,

Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and children, born out of such kinds of relationships be protected, though these types of relationship might not be a relationship in nature of marriage.⁵⁶³

While taking a clear stand against the bigamous/polygamous relationships, the Apex Court in the *Indra Sarma's* case, made, however, a small concession in favour of bigamous arrangements, which was not made in the *Velusamy* case. In the *Velusamy* case, the Apex Court was of the view that the unmarried status of man and woman is

⁵⁶¹ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases.

⁵⁶² *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases. (Para 57)

⁵⁶³ *Indra Sarma v V.K.V. Sarma*, 15 Supreme Court Cases. (Para 62)

one of the essential conditions for a relationship in the nature of marriage.⁵⁶⁴ However, in the *Indra Sarma* case the court took a slightly different view as it mentioned that a relationship between an unmarried woman and a married adult male can be considered a relationship in the nature of marriage within the definition of section 2 (f) of the Act, if the woman *unknowingly* enters into a relationship with a married adult male. In other words, lack of knowledge on the part of the woman about marital status of the man with whom she has been living for a long time in capacity of wife may entitle her to claim reliefs under the 2005 Act.⁵⁶⁵

Apart from the above-mentioned small difference both judgments appear to present a consistent view on the term relationship in the nature of marriage. Although the more recent case of *Indra Sarma* does not make an explicit reference to the judgment in *Velusamy*, a combined reading of both cases leads to the conclusion that according to the Apex Court a relationship in the nature of marriage under section 2(f) of the Act would mean a relationship between a man and woman, (i) who have eligibility to marry or to fulfill conditions for material validity of marriage, (ii) who have lived together for a sufficient period of time, (iii) who hold themselves out in the eyes of society as husband and wife, but (iv) whose relationship cannot be called a legally valid marriage. In other words, a relationship which has all the attributes of marriage, including eligibility of parties to marry, but which cannot be considered a marriage presumably for lack of marriage solemnization or fulfillment of some formalities prescribed under any of the personal laws. In other words, a relationship in the nature of marriage, the Apex Court seems to suggest, would mean a relationship between man and woman which fulfills all conditions of material validity but not of formal validity.

⁵⁶⁴ D. Velusamy v D. Patchaiammal, 10 Supreme Court Cases. (At para 31)

⁵⁶⁵ For a similar view also see *Badshah v Urmila Badshah Godse*, 1 Supreme Court Cases 188 (Supreme Court 2013). While deciding on the maintenance application of a woman under section 125 Criminal Procedure Code, the Supreme Court held that a woman can be considered as a wife for the purposes of this section, as long as it can be proved that the petitioner lady was unaware of the marital status of the man. Earlier the Supreme Court had held in a case in 2005 that a bigamous marriage is not immoral. *Rameshchandra Rampratapji Daga v Rameshwari Rameshchandra Daga*, 2 Supreme Court Cases 33 (Supreme Court 2005). (At p. 40)

While the Supreme Court can be lauded for its efforts to impart clarity to a vital term in the 2005 Act, which had not received due attention for many years after the enactment of the statute, both the above judgments have received their share of criticism from scholars and activists, mainly for a narrow definition to the term ‘relationship in nature of marriage’. The scholarly criticism is well-founded, not only for the above reasons but also because these judgements reinforce a narrow definition of the term Hindu marriage, having used formal solemnization of marriage as the main criteria for distinguishing between marriage and relationships in the nature of marriage.

The above judgments completely ignore the fact that one of the peculiar features of Indian marriage laws, especially of Hindu marriage laws, is recognition to diverse forms of customary marriage solemnization⁵⁶⁶ and wide discretion enjoyed by the courts in determining the issues relating to formal validity of marriages. The marriage laws in India are also supported by a provision of the law of evidence,⁵⁶⁷ which allows courts to draw presumptions of a valid marriage, albeit rebuttable, where no independent evidence of solemnisation of marriage is available, but where there is proof of prolonged and continuous cohabitation between a man and a woman in the capacity of husband and wife in the eyes of society.

The courts’ discretion in determining solemnisation of marriage is related to the fact that the Hindu Marriage Act, though having section 7, which is presumed to prescribe conditions for formal validity of marriages, does not prescribe any particular form for a legally valid marriage. It grants validity to marriages performed

⁵⁶⁶ Section 7, The Hindu Marriage Act, 1955. Section 7 of the Act provides for, Ceremonies for a Hindu marriage. —

- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
- (2) Where such rites and ceremonies include the saptpadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

⁵⁶⁷ Section 114, The Indian Evidence Act, 1872. The Section makes it possible to presume certain facts as it states:

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

in accordance with a wide range of customary ceremonies and rites, which may or may not be based on religious texts.⁵⁶⁸ The customs of marriage which are given recognition in the Hindu Marriage Act vary from elaborate ceremonies to simple rituals and the mere requirement of living together as husband and wife.⁵⁶⁹ Such has been the diversity of forms of marriage solemnisation, especially amongst Hindus, that the issue relating to essential ceremonies of a Hindu marriage, continues to be unsettled even till date.⁵⁷⁰ Since the pre-independence period, the courts in India are constantly being called upon to decide whether a particular customary ceremony claimed by one of the parties to a marriage can be considered legally valid for solemnisation of marriage. While dealing with validity of marriage, another task for the Courts in India has been to decide questions relating to the status and the rights and obligations of those individuals⁵⁷¹ who have been living together in capacity of

⁵⁶⁸ Diwan, *Law of Marriage and Divorce*. (At pp. 132-145)

⁵⁶⁹ *ibid.* At pp. 139-141. In Punjab, under customary law in the *kerava* and *chadar andazi* marriages there are no ceremonies, intention to live together as husband and wife followed by actually so living is enough to constitute a valid marriage and confer the status of husband and wife on the parties. The Indian legislature has passed many Acts to validate different ceremonies of marriage, for example, The Arya Marriage Validation Act, 1937; The Anand Marriage Act, 1909. The Madras legislature amended the Hindu Marriage Act, 1955 by inserting a new section 7A which validates marriages with a very specific customary ceremony. According to Section 7-A a valid Hindu marriage can come into existence:

- (a) by each party to the marriage declaring in any language understood by the parties that each takes the other to be his wife or, as the case may be, her husband; or
- (b) by each party to the marriage garlanding the other or putting a ring upon any finger of the other; or
- (c) by the tying of the *thali*.

While legislature and judiciary has been giving legal recognition to a wide range of ceremonies to constitute a valid Hindu marriage, some scholars of Hindu law, such as Paras Diwan, have been critical of this trend. Diwan strongly advocates the idea that the Hindu marriage Act, 1955 two alternative ceremonies for a valid Hindu marriage, *shastric* ceremonies and rites and customary ceremonies and rites. *ibid.* At pp. 132-133. While Diwan accepts that customary ceremonies may be 'religious, secular, elaborate, brief or nominal', he is critical of judicial trend of giving recognition to new ceremonies, which cannot be proved to be existing since a long time. He, like many other authors of Hindu law, is keen on proving that Hindu marriage requires some very specific ceremonies. Validity of section 7-A was challenged in the Supreme Court of India in the case of *S. Nagalingam v Sivagami*, 7 Supreme Court Cases 487 (Supreme Court 2001).

⁵⁷⁰ For a detailed discussion on different judicial approaches on ceremonies required for a valid Hindu marriage see Agnes, *Family Law II*, 2011; Menski, "Solemnisation of Hindu Marriages."; Menski, *Modern Indian Family Law*, 2001. Diwan, *Law of Marriage and Divorce*. Highlighting uncertainty Diwan mentions,

The judicial pronouncements do not clearly lay down which of the ceremonies are essential for the valid performance of a Hindu marriage. (At p. 137)

⁵⁷¹ The courts have often been faced with questions on validity of marriage in the context of legitimacy of children.

husband and wife for a significant period of time without being able to give proof of having fulfilled formalities necessary to constitute a valid marriage. This arises today most prominently in the context of claims for maintenance after the breakdown of the relationship. For the courts in India, from the times of the Privy Council onwards,⁵⁷² a deciding factor which has weighed heavily while dealing with issues relating to formal validity of marriage, is the existence of the de facto marriage- the existence of the relationship in the nature of marriage.⁵⁷³ The approach of the courts has always been to presume in favour of marriage, even if no independent evidence to prove fulfillment of formalities essential for a legally valid marriage is coming through. Confronted with an issue of relationship between man and woman who have been cohabiting as husband and wife for many years, but whose marriage could not be proved, the Privy Council, considering the law as well settled⁵⁷⁴ as early as in 1929, held that “the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years.”⁵⁷⁵

There exists a series of cases⁵⁷⁶ where the higher judiciary has consistently reinforced this well settled legal position of “presumption in favour of marriage,

⁵⁷² *Mohabbat Ali Khan v. Muhammad Ibrahim Khan* AIR1929PC135

⁵⁷³ Derrett, *A Critique of Modern Hindu Law*. So much has been the focus of the judges on attributes of marriage that one of the leading experts on Hindu Law, Professor J. Duncan M. Derrett once commented that in determining validity or invalidity of marriages, intention should be the criteria. He stated,

Did they intend to become man and wife? If they did so, the choice of ceremony is irrelevant...If on the other hand she aimed to be no more than a permanent concubine, the ceremonies, no matter how elaborate, should not have the effect of turning her into a *patni* against her intention! (At p.300)

⁵⁷⁴ *ibid*, p. 17. The court mentioned,

The law applicable to such a case is quite settled. As Dr. Lushington, delivering the Judgment of the Board, observed in *Khajah Hidayutoollah v. Rai Jan Khanum* 3 M.I.A. 295 : 6 W.R.P.C. 52 : 1 Sar. P.C.J. 282 : 18 E.R. 510. Where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place.

⁵⁷⁵ Similar proposition was laid down in by the Privy Council in *Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy*, AIR 1927 PC 185 where it was stated, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage

⁵⁷⁶ Some examples are: *Gokalchand v. Parvin Kumar*, AIR 1952 SC 231; *S.P.S. Balasubramanyam v. Suruttayan*, (1994) 1 SCC 460; *Ranganath Parmeshwar Panditrao Mali v. Eknath Gajanan Kulkarni*, (1996) 7 SCC 681; *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*, (2005) 2 SCC

where partners have lived together for a long spell as husband and wife”.⁵⁷⁷ The courts in India have consistently been giving such relationships the status of valid marriages, for the simple reason that these relationships were akin to marriage relationships, possessing all the attributes or characteristics of a valid marriage but for the availability of evidence to prove fulfillment of formalities considered as essential for a legally valid marriage.

It is true that there is no single judgment so far which lays down the guidelines for drawing presumption in favor of marriage or for relationship in the nature of marriage. However, a combined reading of the case law relating to presumption of marriage leaves no doubt that the relationships fit for drawing presumption of a valid marriage are those, where there is no proof of fulfillment of legal formalities of marriage but which have all the attributes or inherent characteristics of marriage, as suggested by the Apex Court in *Indra Sarma's* judgment. However, the paradox is that while in 1869 the proof of a relationship in the nature of marriage, made it possible for a woman to claim the status of marriage relationship, in 2014 with the judgments of the Supreme Court in *Velusamy* and *Indra Sarma's* cases, the claim would only be to a kind of ‘live-in relationship’ or a relationship which has a status lower than that of marriage, where women and children involved would be enjoying lesser rights than what could be enjoyed earlier. And, undoubtedly, by no stretch of imagination can this be considered a progressive move of taking into account a new social phenomenon. Instead, it is about giving a new name to an old phenomenon, with lesser rights for women and children involved.

It is true that to claim the benefit of the presumption of marriage the woman concerned has to claim some sort of solemnisation of marriage. The judges cannot invoke the presumption of marriage in the absence of any such claim being made by the woman concerned. It can also be argued that because of this authoritative definition to the term relationship in the nature of marriage by the Supreme Court in

244); *Tulsa v Durgatiya*, (2008)4SCC 520. Not only the courts have been presuming in favour of marriage, in *Tulsa's* case the Court also held,

There would be presumption in favour of wedlock if the partners lived together for long spell as husband and wife; but it would be rebuttable and heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. (At p. 525)

⁵⁷⁷ *Badri Prasad v Deputy Director of Consolidation*, (1978)3SCC527

Indra Sarma's case a woman need not make any claim relating to marriage solemnisation. Neither she has to wait for the judges to exercise discretion and make a presumption in favour of marriage under section 114 of the Indian Evidence Act. The reliefs under the 2005 Act can now be claimed by a woman who has been living in a relationship in the nature of marriage as a matter of right.⁵⁷⁸ However, the 2005 Act, while ensuring reliefs ensure that the woman concerned cannot claim status of wife.

But does this mean that the provision relating to presumption of marriage is now to be rendered irrelevant? If not, then on the basis of interpretation to the term relationship in the nature of marriage by the Supreme Court, do we have to infer that women now have a choice between claiming marriage by invoking the presumption or relationship in the nature of marriage under the 2005 Act? And, can any woman, who would, in any case, be under an obligation to give evidence of prolonged, continuous cohabitation with a man in capacity of wife, be advised to settle for lesser status and transitory reliefs under the 2005 Act, when it is possible to claim the status of wife and all entitlements associated with it? Perhaps, the answer has to be in the negative. But then, has the Supreme Court in the recent judgments discussed here offered anything new? Perhaps, the answer again has to be in the negative.

The Supreme Court in the *Indra Sarma's* case could be seen as offering something new in the spirit of the 2005 Act, had it meant giving an opportunity to the individuals to strike certain arrangements, oral or written, for living together in intimate relationships with or without intention to marry. But, no part of two judgments lends itself to such an interpretation or can be read as laying down law for giving recognition to any such kind of co-habitation arrangement. Instead, it appears that relief under the 2005 Act can be claimed only by those women who have been in prolonged and continuous cohabitation as husband and wife. In the Indian context, where 'common law marriages' are an old phenomenon,⁵⁷⁹ where law gives

⁵⁷⁸ For similar concerns in western jurisdictions see "Marriage as Contract and Marriage as Partnership: The Future of an Antenuptial Agreement."

⁵⁷⁹ Menski, *Modern Indian Family Law*, 2001.

recognition to diverse forms of marriage solemnization,⁵⁸⁰ and where registration of marriages is not an essential condition for validity of marriages, the distinction between marital and non-marital relationships on the basis of fulfillment of some legal formalities may lead to precarious consequences.

Far from accounting for any new phenomenon or granting better rights to women, insistence on fulfillment of specific formalities as a criterion for determining legal validity of marriage, may have undesirable effects. This may result in a situation where many relationships would be deprived of the status of marriage and the woman involved therein would be denied the rights and entitlements associated with it. It may also have another undesirable effect of judges' attempting to impose some specific forms of marriage solemnization as legally valid forms, thereby curtailing the freedom of individuals to choose the custom-based or other forms, which were allowed to them even in the traditional system and which have been given protection even under the modernistic and reformed Hindu Marriage Act, 1955.

One can probably attribute responsibility for above state of affairs to the judiciary, more particularly to the Apex Court of India, given the fact that it is the judgments of the Apex Court which have brought about the above precarious situation with potentially for denial of rights to women. One can also blame judiciary for such a narrow definition to the term relationship in nature of marriage or for imposing conditions like 'living like spouses' or 'cohabitation for a significant period' for making woman entitled to claim protection. The 2005 Act, with its concern to extend protection against violence to women in non-marital relationships, is undoubtedly a welcome initiative. However, in the Indian context, in order to ensure that this concern translates into meaningful measures for the rights of women, there is a need for further debate on the meaning of the term 'relationship in the nature of marriage'. And such a debate is required not only for some new social phenomenon, but also for the old phenomenon of bigamous or adulterous relationships, the old practices which have refused to be tamed even by the instruments of criminal law. There is surely an imminent requirement to deliberate on the issue of rights of

⁵⁸⁰ *Supra* fn 567, 568

women who, knowingly or unknowingly, become part of relationships which would be bigamous or adulterous in nature.

Presuming that following the west, more and more couples in urban areas are willing to live-together without fulfilling any kind of marriage formalities, the new phenomenon which may need consideration could be relating to the arrangements between men and women to be in cohabitation arrangements of whatever duration, with or without intention to fulfill the rights and obligations associated with marriage, or of presenting themselves as husband and wife in eyes of society. The issue of giving legal recognition to the relationships of the above nature requires, as is obvious, greater deliberation on vital matters such as the nature of reliefs available under the 2005 Act. Once we agree on giving legal recognition to the co-habitation arrangements or to the contracts to live together, more discussions would also be required on issues such as: what should be the nature of rights granted to women in such relationships, which are not in the nature of marriage or which are mere arrangements or contracts to live-together without having all or any of the attributes of marriage identified in the recent Apex Court judgment? Can there be or should there be any difference between the rights or entitlements of women whose relationship can be termed as marriage or those whose relationship cannot be termed as marriage not even having attributes of marriage? What kind of economic rights can be granted to women in such relationships against the male partner as well as against the relatives, both male and female, of that partner? Would and should there be differences in entitlements during the relationship and after it ends?

While there is an urgent need for scholarly energies to answer above questions, can this be possible without scholars' and activists' willingness to take cognizance of legal pluralism as an ancient phenomenon in India? Is scholarship in India inclined to seek answers to any of the above or similar questions given its reluctance to challenge those understandings about traditional institutions of marriage and family which came into existence during colonial era and which have been used since then to justify that India needs to follow the same path of progress which is presumed to have been followed by the West?

4.5 Emerging Concern for Plurality: A Reason for Crisis in Women's Rights Scholarship

Women's rights scholarship in India during last few decades has undoubtedly become more complex and nuanced as compared to the works in earlier streams.⁵⁸¹ Scholars are no longer willing to accept the simplistic solutions for women's empowerment such as substituting religion based laws with modern, secular laws. Scholars are also not inclined to accept rather simplistic ideas of law as objective entity autonomous from society and are now willing to accept close connection between law and ideology or law and society. However, as a closer analysis of scholarly writings and the recent legislative developments undertaken above exemplify this shift or complexity in scholarship, though claimed as paradigmatic shift by some feminist scholars, does not mean challenging, in any fundamental way, the framework for social change which came into existence during the colonial rule. In recent scholarship too, the causes of oppression of women and the means to deal with the diagnosed causes is the same as was suggested by the colonial rulers.

In other words, in recent scholarship too, scholars attempt to take a pro-plurality or anti-colonial stance, does not mean in any way challenging the dominant presumptions: that indigenous traditions in India, which lay great importance on the institutions of marriage and family are sources of oppression of women and that empowerment of women in the traditional societies like India, can be possible only by eradicating influence of traditions from all spheres of life through instrument of the State and the Law. The new phase in feminist scholarship, despite great rhetoric, is not about challenging the binary opposition of backward traditions v progressive modernity. The new phase is not about challenging the series of binary oppositions, family v individual, sacrament v contract, rights v duty, custom v law, which have been used since colonial era label traditions as backward, non-progressive and static. Much like colonial rulers and the earlier streams of women's rights scholarships, the scholars in recent streams find no reason to question the presumption that any improvement in situation of women in India is possible only by seeking a rupture

⁵⁸¹ Sanjukta Ghosh, "Feminism in India," *Dissent Magazine*, (2007), https://www.dissentmagazine.org/democratiya_article/feminism-in-india; Chaudhuri, *Feminism in India*.

from the ‘past’⁵⁸² - only by making a transition from tradition to modernity. Despite much critique of liberal legalism and liberal feminism, there is not much doubt for feminist scholarship in India that law has to ensure that women can also emerge as ‘independent, autonomous individuals’ who much like men, are in a position of imposing their desires on the world.⁵⁸³

The recent shift in the women’s rights discourses is not about going beyond the partial and distorted understandings of ancient, indigenous traditions and making efforts for nuanced understanding of indigenous traditions in India to rethink relationship between law and traditions in India. The complexity in recent works is also not result of the efforts to explore ways for the State and the legal system to protect rights of women while being sensitive to cultural diversity in India. Instead, as a result of scholars’ reluctance to go beyond colonial era presumptions, there is a situation, as the example of the 2005 Act demonstrates, where far from enjoying better rights in changed social and economic circumstances, women are deprived even of those rights which were available even in a very traditional, male-dominated, social system. Far from having new ways to deal with plurality what we have is: a crisis like situation and which most pronounced in the field of family law. There is a situation of crisis because on one hand women’s rights scholarship must work towards establishing the need for seeking transition towards modernity. On other hand it must maintain the appearance of sensitivity towards cultural and religious diversity, while being fully aware that India, like in many Asian and African cultures, consists mainly of those cultural groups where family remains basic unit in society, where division of life spheres into secular or religious or

⁵⁸² For insightful discussion on “Break from past” as a specific feature of modernity and forms of knowledge emerging from sixteenth century onwards see Santos, *Toward a New Common Sense*. Offering an insightful critique Santos states,

The new scientific rationality, being a global model, is also a totalitarian model, in as much as it denies rationality to all forms of knowledge that do not abide by its own epistemological principles and its own methodological rules. Such is the main feature of the new paradigm, the feature that best symbolizes its break with the preceding scientific paradigms. It is clearly defined in Copernicus’ heliocentric theory of the movement of planets, in Kepler’s laws on the planet’s orbits, in Galileo’s laws on the gravity of bodies, in Newton’s great cosmic synthesis, and lastly, in the philosophical consciousness that Bacon and Descartes confer upon the findings of the previous scientists. The idea of being witness to a fundamental break with the past and to a new and exclusive form of true knowledge is evident in the protagonists’ attitudes. (At p. 12)

⁵⁸³ West, “The Difference in Women’s Hedonic Lives.”

relegation of religion to a private sphere or separation between law and culture or law and religion are alien ideas emerging from foreign worldviews. Given reluctance of scholars to question its antagonism towards indigenous traditions and in absence of alternative ways available to conceptualise notions of law, rights and women's empowerment, the only option available for scholars is to develop a disguise- a disguise for perpetuating antagonism towards traditions and for paying lip service to the cause of cultural diversity. Consequence is a situation of crisis because on the one hand, due to important changes in legal feminism in the west, it is no longer possible to adhere to same simplistic framework that was used by scholars in pre-1990s phase. On the other hand there has not emerged on horizon any other alternative framework which makes protection of rights of women possible without seeking eradication of cultures through instrument of law.⁵⁸⁴

4.6 Post-1990s Framework: An Instance of Increasing Politicisation of Rights to Women

Women's movement in India having its roots in legal reforms of 18th century is nearly two centuries old now. Having nurtured a close relationship with law this movement has many legislative victories to its credit- the legislations which touch almost every sphere of women's lives- be that the sphere of personal relationships or the formal sphere of work and public interactions.

However, unfortunately, despite this intense legislative activity relating to women's issues, women's rights discourses in India, particularly scholarly discourses, right from its inception, have been more about politics and less about issue of women's rights per se.⁵⁸⁵ These discourses have been more about taking sides between the

⁵⁸⁴ Parashar and Dhanda, *Redefining Family Law in India*. While accepting the fact that cause of women's rights in India require some culture specific solutions Dhanda and Parashar state, Family law theory produced in the Euro-American universities is the context in which Indian legal scholars must develop their ideas. (At p. 8)

⁵⁸⁵ One of the most recent example and evidence of politicisation of women's rights in India is the way the on-going debate on the issue of a customary form of divorce among muslims, popularly known as '*triple talaq*' is being conducted. *Triple Talaq*, is one of the customary forms of divorce practiced among Muslims. It is a form which gives unilateral right to men to dissolve marriage, by pronouncing *talaq* (literal meaning divorce) three times. Seen as an easy way out of the marital and family responsibilities for men, *triple talaq* has been under attack from all sections of society as a highly derogatory, anti-women practice, which gives unwarranted power to men to throw women out of marriage. This customary form of divorce and the practice of

polarised binaries of backward east v progressive west and less about the real concern for protecting rights of women in diverse cultural and religious communities in India. Women's rights scholarship in India has not been concerned about protecting rights of women in diverse traditions which have nurtured worldviews different from that which came to be introduced in India as a result of colonial rule under the broad rubrics of 'modernity'.

Indeed during last few years there has emerged extensive scholarship where scholars have taken account of the fact that issue of women's rights in India has been more a matter of political contestation between dominant and powerful political groups. In fact during past few decades there has emerged a separate stream of studies, named post-colonial studies, where one of the major concerns for scholars is to highlight how the issues relating to women's rights came to be exploited by colonial rulers as

polygamy amongst Muslims have always been on reform agenda of those concerned with social change and women's empowerment in India. While both practices have kept surfacing in Indian socio-legal discourses time and again, often to reinforce demand for Uniform Civil Code and abolition of personal laws, abolition of *triple talaq* has emerged as a central issue since the Apex Court of India took suo moto cognizance of the issue- whether to deny legal recognition to practice of triple talaq or not? See Prakash and Ors. v. Phulvati and Ors., 2 Supreme Court Cases 36 (Supreme Court 2016).

Given the fact that over the years triple talaq has come to be associated with Muslim identity in India, abolition of this practice has taken a hugely political and communal overtones. It is true that the issue of *triple talaq* has been politicized unwarrantedly by political parties in India. It can also be accepted that 'women suffer not so much from divorce as more from economic disempowerment'. Malavika Rajkotia, "The Case Against Abolitionists," *The Indian Express*, June 2, 2017, <http://indianexpress.com/article/opinion/columns/triple-talaq-muslim-women-the-case-against-abolitionists-4684993/>. However, despite above, what is problematic is politicization of this issue even by renowned academicians family law scholars like that of Flavia Agnes. See Flavia Agnes, "Let's Talk about Women's Rights," <http://www.asianage.com/>, May 23, 2017, <http://www.asianage.com/opinion/oped/230517/lets-talk-about-womens-rights.html>. In this piece, Agnes, undoubtedly, expresses a very valid concern as she mentions that the issue of *triple talaq* should not be used to wage war against customs and customary practices in general or to perpetuate the colonial legacy of labeling customs as backward and oppressive. However, her concern for customs does not in any way challenge the binaries of sacrament v contract or status v contract. Agnes strangely enough defends practice of *triple talaq* as according to her this practice is a sign or progressiveness of Islam which endorsed the idea of 'marriage as contract' in contrast to other religions, which supported the idea of marriage as sacrament, and therefore, are to be seen as backward. According to Agnes, *triple talaq*, "a practice which gives unilateral right to divorce or concept of dissoluble contractual marriage is contribution of Islamic law to the world." Also, Agnes feels shocked that there is a section of feminists, who despite being secular feminists consider marriage as a status and not merely a contractual obligation. For another recent example of continuing politicization of the issue of women's rights see "In the Name of Women." While criticising the ruling BJP, the political party in power at the center, for highlighting the issue of 'triple talaq' prevalent amongst muslims, the editorial mentions,

As for gender equality, the status of women within Hindu society is hardly something to be proud of even as these men bemoan the conditions of Muslim women.

well as by indigenous elite to further their own commercial and political interests. Much of what was considered panacea for progress and a gift of the progressive Western civilisation to backward eastern traditions has come under challenge. There exists now rich interdisciplinary literature where one of the main engagements of scholars has been to deconstruct superiority claims of enlightenment philosophy, rule of law and rights discourse which were used by colonial rulers to establish degenerate nature of Indian society and to justify and perpetuate imperialism. Also under attack are binaries of tradition v modernity or east v west which were central to social change discourses during colonial rule.

Yet, what is problematic is that the above realisation amongst contemporary scholars, particularly amongst women's rights scholars, about politicisation of women's rights issues has not prevented its politicisation further. On the contrary, with certain kind of political developments in India from 1990s onwards⁵⁸⁶, the situation has worsened. What we have is much crass politicisation of issue of women's rights. There has emerged on the horizon a new binary of Hindu majority v Muslim minority, where all that was considered panacea for progress is now to be considered a tool in the hands of dominant Hindu majority to harass the Muslim minority.⁵⁸⁷ There is no change in the 'context of civilisational encounter' which, as many scholars argue, offered fertile ground for politicisation of women's issues during colonial rule. Contemporary discourses make it mandatory to reject traditions

⁵⁸⁶ For a comprehensive account of changed political scenario and its influence on women's rights see Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press, 2011).

⁵⁸⁷ Menon, "It Isn't about Women." Menon writes,

A Uniform Civil Code is meant to discipline Muslims, teach them (if they didn't know it already) that they are second-class citizens, and that they live at the mercy of "the national race" (the Hindus), as M.S. Golwalkar decreed.

Also see Choudhury, "(Mis)Appropriated Liberty." Choudhury writes,

Until the state is no longer a major site of oppression for all Muslims, until Muslim women's particular experience at the intersection of gender and religion is taken seriously by dominant women's groups, and until the discourse of women's rights in general is reclaimed from the Hindu Right, the efforts of Muslim women to enact reforms within their own communities and to foster dialogue with secular feminist groups are the most effective ways to change their lived experience. (p. 110,111)

Also see Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press, 2003); Kapur, "The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India."

or take a stand against traditions in order to support the cause of women's rights. There hasn't emerged any framework to reconceptualise antagonistic relationship between law, women's rights and traditions- wherein it can be possible to use legal means to endorse both the causes: the cause of women's rights and the cause of protection of cultural diversity. As a result what we have is a feminist scholarship which produces a situation where support to tradition means rejection of idea of women's empowerment. This leads feminist scholarship into a situation of self-contradiction. It results into a situation where feminist scholarship is neither able to serve the cause of gender justice nor of cultural diversity. As a human rights scholar cautioned years ago, in absence of efforts to understand non-western worldviews the only option for rights scholars is to declare as anti-feminist Asian and African societies.⁵⁸⁸

And the consequence of this much polarised binary debate is that there hasn't emerged any rational framework for offering legal protection to large numbers of women for whom dream of modernity is not realisable and who have been deprived of the protection of traditions. Not having made efforts to overcome its antagonism towards traditions women's movement has done the disservice of denying even the protection available under the tradition where no new legal remedy is forthcoming. The consequence is that for a large number of women on one hand the rights available under the tradition are denied and on the other hand new rights through legal means are either not available or where they are available they can be claimed

⁵⁸⁸ Sinha, "Human Rights." Cautioning against such an approach Sinha stated,

It is necessary to move forward, and that movement forward cannot be accomplished on the basis of the present single-catalog approach. Insisting upon this catalog, with its subsumptions of individualism, rights, and legalism, as the only possible means of human emancipation, leads us to two possible alternatives. One, we must ignore social order which are not based on individualism, rights and legalism. Two, we must force this conception of social order upon societies which are conceived differently. The first alternative has two consequences. On the one hand, it keeps most of the humanity outside its scope so that it really is incapable of relating to the peoples of the non-western social orders discussed above. On the other hand, and conversely, by its inability to relate to these societies it enlarges the scope of injustice inflicted by their governments upon their peoples. The second alternative of enforcing the individualist-rightist-legalist conception of social order on the societies which have not cast in this mold is, in the first place, impossible..... What is required is a redefinition of the problem of human rights which would focus not so much upon a particular way of human emancipation but at the very issue of that emancipation, recognizing the fact that there are more than one way of achieving such emancipation. It is, therefore, necessary to separate the concept of human rights from any particular catalog thereof. What is universal is the former, not the latter. (At p. 89-90)

only through a heavy cost- the cost of taking stand against one's own traditions and that too in the situations where it may not be necessary at all.

Can there be a way out of this situation? Can it be possible to talk about rights of women without taking sides between tradition and modernity or without expecting law to eradicate influence of traditions and religion? Can it possible to use legal means for dealing with menace of certain practices prevalent in some communities without taking sides between tradition and modernity?

The next chapter aims to explore answers to above questions. It aims to address the issue of antagonism between women's movement and indigenous traditions- the root cause which has been responsible for politicisation of issue of women's rights since colonial era.

Chapter Five

Conclusion

Rethinking Relation between Law, Gender Justice and Traditions: Some Essential Steps

The relationship between culture and rights has been one of the most contentious issues for socio-legal scholarship in all parts of the world since advent of colonial era. One of the primary concerns of scholars and activists has been to find ways to ensure protection of rights of individuals in non-western societies while being sensitive to cultural diversity. During last few decades there have also emerged important insights from different disciplines, which underscore the fact that cause of women's rights anywhere in the world requires rethinking opposition between culture and rights.⁵⁸⁹ While this shift in scholarly approach towards cultural diversity at the international level should have been a positive sign, the unfortunate situation is that in the Indian context, influence of critical theory and recent changes in women's rights scholarship, far from being beneficial, is becoming a reason for denial of rights to women. Scholars' efforts to incorporate insights of critical theory in Indian debates, has led women's rights scholarship to a situation of crisis. In matters relating to family there is a situation of crisis because on the one hand women's empowerment can no longer be linked to transferring complete control of regulation of marriages and family to the State. On the other hand there hasn't emerged any alternative to transferring complete control to the State in regulation of family matters. This chapter aims to explore ways to address the above-mentioned situation of crisis. It aims to understand the reasons why scholars' changing expectations from law to be sensitive towards differences between women, far from being beneficial, is turning out to be a cause of denial of rights of women. It makes an attempt to understand if it can be possible to go beyond the opposition between tradition and modernity or culture and rights.

⁵⁸⁹ *Supra* chapter 1, section 1.3

This chapter aims to explore the possibilities to address the hostility towards traditions in India, which has been and which continues to dominate socio-legal discourses. Aiming to explore ways to transcend opposition between culture and rights it argues that roots of the crisis lie in scholars' reluctance to go beyond the colonial presumptions about non-western societies and also about relationship between law, cultural diversity and progress.⁵⁹⁰ It further argues that reasons for crisis can also be traced to the fact that socio-legal discourses in India continue to ignore the long-standing anthropological insights which highlighted (i) that enlightenment philosophy, rule of law and rights discourses are culture specific developments rooted in specific developments in the West⁵⁹¹ and (ii) that attempts to impose these developments on the non-western societies not only amounts to cultural imperialism or ethnocentrism⁵⁹² but is also counter-productive for the cause

⁵⁹⁰ Griffiths, "What Is Legal Pluralism?" Questioning the opposition between western law as progressive and non-western law as primitive Griffiths wrote,

The theory of law in 'primitive' society has also suffered indirectly, by way of 'false comparisons' with the idealized picture of law in 'modern' society. (At p. 4)

For discussions on used of biased presumptions non-western countries in the United States see Michelle A. McKinley, "Cultural Culprits," *Berkeley Journal of Gender, Law & Justice* 24, no. 2 (2009): 91. McKinley states,

The invocation of "culture" as a "cracking factor" or as a justification for criminal behavior in U.S. courtrooms reinforces an already widely held assumption about the incommensurability of gender equality and non-western cultures--i.e., that non-western cultures are inherently more sexist, brutal, illiberal, and intolerant--and that these attitudes and practices are better left behind in the "old country" than in the land of the free. Thus, as an initial step, the ideas of culture should be challenged. Culture is wielded in the courtroom as a monolithic, explicable construct that motivates people to "crack"--or act in certain ways. Unlike religion, or the even more ephemeral "values" which have achieved an a priori level of questioning as a means of explaining behavior, culture is fixed. (At p. 96-97)

⁵⁹¹ For a detailed discussion on culture specific roots of enlightenment philosophy as it emerged in 18th-19th century Europe see American Anthropological Association The Executive Board, "Statement on Human Rights," *American Anthropologist* 49, no. 4 (1947): 539-43; Jack Donnelly, *The Concept of Human Rights* (London & Sydney: Croom Helm, 1985). Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Charles Taylor, *Sources of Self: The Making of the Modern Identity* (USA: Harvard University Press, 1992).

⁵⁹² John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London; New York: Routledge, 1995); Santos, *Toward a New Common Sense*. Offering a critique to the concept of autonomy Santos writes

As a matter of fact, under the welfare state, the horizontal political obligation was transformed into a double vertical obligation between the taxpayers and the state and between welfare clients and the state. In this way, the exercise of autonomy presupposed by the principle of community was transformed into an exercise of dependence on the state. (At p. 78)

Also see Zygmunt Bauman, *In Search of Politics*, 1 edition (Stanford, Calif: Stanford University Press, 1999).

of women's rights.⁵⁹³ Root of the problem lies in ignorance towards the repeated reminders given by the anthropologists about western nature of human rights discourse and its limitations for non-western societies. It is result of continuing reluctance in making efforts to look for the different ways available in different cultures for protection of human dignity.

5.1 Need for Looking Beyond the Category- 'Non-Western Traditions'

Rooted in increasing dominance of enlightenment philosophy⁵⁹⁴ the main reason for denigration of non-western traditions lies in the way we understand the distinction between tradition and modernity. Denigration of cultures is based on the understandings that it is only and only modernity which could save human beings and humanity from the tyranny of religion and customs, from arbitrariness and oppression prevalent in non-western traditions. Enlightenment philosophy, modernity, rule of law, human rights, on the other hand, have been about promise of 'emancipation through reason and law'.⁵⁹⁵ Traditions, non-western traditions in particular, scholarly discourses continue to propagate, have been about suppression of human will, subjection to what is 'given', given by the God or by those as powerful as God!

Modernity is believed to have been able to save human beings because it's unique characteristics: concern for human dignity; possibilities for realisation of full human potential, for exercise of human agency and freedom to choose one's own way of life. An unquestionable scholarly assumption seems to be that it is only and only enlightenment era and the associated elements of the human rights and rule of law

⁵⁹³ Sinha, "Human Rights." One of the most important proponents of this view in recent years is Menski, *Comparative Law in a Global Context*. Also see Ved P. Nanda and Surya Prakash Sinha, eds., *Hindu Law and Legal Theory*, International Library of Essays in Law and Legal Theory (England: Dartmouth, 1996).

⁵⁹⁴ For detailed and critical discussions on enlightenment philosophy and its increasing influence in the West see Costas Douzinas, *The End of Human Rights* (Oxford; Portland, Or: Hart Publishing, 2000); also Gray, *Enlightenment's Wake*; Santos, *Toward a New Common Sense*.

⁵⁹⁵ Douzinas, *The End of Human Rights*. (At p. 2) Douzinas states
Western self-understanding has been dominated by the idea of historical progress through reason. Emancipation means for the moderns the progressive abandonment of myth and prejudice in all areas of life and their replacement by reason. In terms of political organization, liberation means the subjection of power to the reason of law. (At p. 5)

discourses which have allowed human beings to be fully human.⁵⁹⁶ It is modernity which has allowed each human being to be an end in himself or herself instead of being only a means for maintaining some Higher Order or peace and harmony in society, as human beings have always been presumed to be in the non-west and also in the pre-modern West.⁵⁹⁷ It is only with advent of enlightenment era and modernity, it has been believed, it became possible to bring to forefront the idea of distinctiveness of human beings vis-à-vis other elements in the Universe- in being endowed with faculty of reason and choice, in having potential of knowing his or her nature, in possessing the will and capability to act on one's own choice based on reason, and acting accordingly.⁵⁹⁸ Modernity has been seen as an entity in opposition to traditions based on the belief that only modernity brought forth the understanding that every human being, endowed with the elements of human distinctness, is an independent, autonomous, self-sufficient being, 'in a certain sense absolute and irreducible to another', an end in himself or herself.⁵⁹⁹ Modernity was seen to be creating conditions for realisation of full human potential because with modernity emerged concepts like secularism, and a new conception of law and rights. It was secularism which made it possible for human beings to be governed by laws which were free from influence of religion and traditions. It has been modern law or the 'rule of law' doctrine which could offer possibilities to conceive a society governed

⁵⁹⁶ Donnelly, *The Concept of Human Rights*. Explaining expectations from the a society which respects human rights Donnelly writes,

The underlying moral vision of human nature, if expressed and implemented in form of human rights, will actually *create* the envisioned person, so long as it lies within the psycho-biological and social limits of human possibility. Thus human rights represent a special sort of self-fulfilling prophecy and provide a plan for the construction of a political regime in which a truly human being can lead a life of dignity, developing and expressing the moral possibilities of human nature. (At p. 2)

Also see Douzinas, *The End of Human Rights*.

⁵⁹⁷ Madhavi Sunder, "Piercing the Veil," *The Yale Law Journal* 112, no. 6 (2003): 1399–1472. Sunder argues

religion qua religion is less the problem than is our traditional legal construction of this category. Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed--in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the "other" of international law.

⁵⁹⁸ Pannikar, "Is the Notion of Human Rights a Western Concept?"

⁵⁹⁹ Douzinas, *The End of Human Rights*.

by rational, objective and neutral principles and rules which could ensure freedom from arbitrariness and also from the demands of passive submission to customary or religious laws. It is rule of law and human rights doctrine which has made it possible for an individual to be a human being irrespective of sex, status, role, or position in society, which made it possible for an individual to be an autonomous being, governed by one's own free will, free from all kinds of constraints, religious, moral or customary. Only with human rights doctrine it could become possible to move towards a society, where every human being could emerge as a 'moral sovereign agent'.⁶⁰⁰

While anthropologists have been highlighting ethnocentrism and cultural imperialism inherent in enlightenment philosophy since colonial era, with increasing influence of critical theory in recent decades many of the above claims of enlightenment philosophy and modernity are under serious challenge.⁶⁰¹ As this study has shown, the above challenge has also resulted in emergence of a new phase in socio-legal scholarship in India.⁶⁰² However, there is a lot that has remained unchanged when it comes to the understandings about non-western traditions. As our focus on women's rights scholarship in India has also shown there are not too

⁶⁰⁰ *ibid.* Offering a critique of liberal philosophy and its assumptions of a human being as a 'pre-moral' entity, as autonomous and self-disciplining subject, Douzinas note,

We are left with a notion of the human subject as a sovereign agent of choice, a creature whose ends are chosen rather than given, who comes by his aims and purposes by acts of will, as opposed, say, to acts of cognition. (At p. 4-5)

⁶⁰¹ *ibid.* Douzinas note,

Unfortunately political philosophy has abandoned its classical vocation of exploring the theory and history of the good society and has gradually deteriorated into behavioural political science and the doctrinaire jurisprudence of rights. (At p. 6)

Also see Rouland, *Legal Anthropology*. Rouland expresses similar view as he describes the difference between the modern law (or western law) and traditional understanding of law as follows:

Modern law does not regard truth as a value of fundamental importance, since the main thrust of law is to protect citizens against actions which threaten their rights. Also, as we all know, traditional societies tend to determine what is just by referring to a model of behavior rather than to a prevailing norm. In addition, modern societies, closely associate the principle of justice with coercive sanction, to which our symbols of sword and scales so eloquently testify. The traditional jurist is concerned more with discovering and instilling truth and justice than with using sanctions, and such sanctions as are in fact exercised assume the form of non-jurisdictional procedures. (At p. 115)

For a detailed discussion *Supra chapter 1*

⁶⁰² *Supra chapter three*

many efforts in scholarly writings concerned about social change in India to challenge the ideas: that modernity is about human beings, about importance to human agency and possibilities to exercise faculty of choice for determining one's own way of life; whereas traditions and religions, are believed to be about concern for family, community, social order or the Higher Order and not for individual well-being, individual growth or autonomy.⁶⁰³ There are also not many challenges to the presumptions that there is no role of human agency or no possibilities for exercise of faculty of choice in traditions or religions in India, specifically in Hindu traditions.⁶⁰⁴ It is true that in Indian discourses there has been strong presence of a stream of scholars who have offered support to traditions.⁶⁰⁵ Such works have challenged the label of backward or non-progressive for societies which give more importance to the institutions of family and marriage or which reject the idea of 'legal rights' as the only basis for organization of relations between individuals. Challenge has also been made to the practice of equating progressiveness with those societies which consider individual and not the family as basic unit in society or where marriage is treated as a contract and not a sacrament. However, support to traditions has neither meant challenging the binary of religious v secular nor has it been about challenging the understanding of *dharma* as a set of norms received from Heaven. Even those who stand in favour of traditions have accepted unquestioningly that religions and traditions are concerned more about the sustenance of whole humanity and a Higher Order and not so much about well-being and autonomy of the individuals. And the West, the belief has been, is about giving more importance to individual autonomy, to individual growth and well-being and to individual (human) desires and not to the well being of the humanity or maintenance of harmony and peace in society. Far

⁶⁰³ *Supra* chapter 4.

⁶⁰⁴ For endorsing the colonial era divide between tradition and modernity see Harold G. Coward, "India' Constitution and Traditional Presuppositions Regarding Human Nature," in *Religion and Law in Independent India*, ed. Robert D. Baird (New Delhi: Manohar Publications, 1993), 23–39. Coward sees a fundamental clash between Hindu religion and Indian Constitution. In the former, Coward argues, inequality is a fundamental tenet whereas the latter, as a British legacy is seen to be promoting equality. Coward dwells in to basic tenets of Hindu religion to establish that it endorses inequality, however, there is not much discussion on the concept of equality embodied in the Constitution.

⁶⁰⁵ Jois, *Ancient Indian Law: Ancient Values in Manusmriti*. Also, Altekar, *The Position of Women in Hindu Civilization*. For a strong critique of this approach see Menski, *Hindu Law*. ; also Werner Menski, "Hindu Law as a 'Religious System,'" in *Religion, Law and Tradition*, ed. Andrew Huxley (London: Routledge Curzon, 2002), 108–26; Nandy, *The Intimate Enemy*.

from challenging the above way of understanding distinction between the East and the West, in many such writings supporting traditions lack of concern for individual has been a reason to claim higher moral ground for non-western traditions, especially Hindu traditions.

In such works concern for non-western traditions has not meant refuting the wrongful colonial era assumption that importance to institutions of marriage and family means denial of what are perceived as individualistic rights to women, such as right to divorce, right to separate residence and maintenance, right to own property etc. Even for those scholars who challenge the 'western idea of progressiveness' there aren't many efforts to challenge the presumption that right of divorce or right to property for women is an idea alien to the cultures, like Hindu cultures, which nurture the idea of marriage as sacrament or where marriage and family are considered as sacred institutions.⁶⁰⁶ Moreover, most these works are more than willing to

Most scholars endorse the presumption that there is no role of human agency or no place for exercise of faculty of choice in Hindu traditions since the greater concern here is sustenance of whole humanity and a Higher Order, contrary to the West where individual (human) desires are given more importance instead of overall well being of the humanity.⁶⁰⁷ Scholars simply want to defend the idea that there is no possibility of divorce particularly for women since marriage here is a sacrament, an indissoluble union, meant for the well-being of society, instead of being a contract, dissoluble merely at the will of individuals. Without making any challenge to the idea that Hindu tradition curtails rights of women or restricts their role to that of wives and mothers or that sexual and moral subordination of women is integral to Hindu tradition, a trend in Indian socio-legal discourses has been to endorse the presumption that various individualistic rights are alien to Hindu traditions. Most scholarly works far from challenging the above idea merely offer explanations such

⁶⁰⁶ Monmayee Basu, *Hindu Women and Marriage Law: From Sacrament to Contract* (Oxford University Press, 2001).

⁶⁰⁷ Jois, *Ancient Indian Law: Ancient Values in Manusmriti*. (At p. 131)

as great concern for stability of family or sanctity of marriage as reasons for curtailing rights of women.

It is true that in recent years, as this study has highlighted, women's rights scholars in India have come to challenge the divine basis of personal laws.⁶⁰⁸ Scholars have also taken cognizance of the fact that personal laws, such as Hindu laws and Muslim laws are inherently plural entities. Some scholars have come to challenge the practice of reducing personal laws to a set of norms received from Heaven. There is also a strong challenge to the practice of privileging scriptures or religion based texts as sources of law. However, the above shift in understanding of personal laws has not been accompanied by any significant challenge to the colonial era idea that importance to *dharma* or religion or concern for maintenance of Higher Order means unconditional, passive submission to certain set of 'given norms' with no possibility for exercise of human agency by common people, especially women.⁶⁰⁹ Furthermore, emphasis on duty in indigenous traditions continue to mean expectations to fulfill certain God determined obligations or duty to follow the orders of others, to govern one's life according to wishes of others with no possibility to claim anything out of one's own will or choice. The dominant presumptions in socio-legal scholarship in India remain to be: that the traditional societies are about imposing or seeking passive submission of individuals to pre-determined roles and identities with no role for human agency. On the other hand, the West, modernity and modern societies are about liberation of individuals, about freedom to determine one's own identity and choose one's own way of life.⁶¹⁰

There is also no questioning of the presumption that granting various rights to women in the sphere of family- that is right to divorce, right to property, right to separate residence and maintenance, right to marry according to one's own choice- means: (i) neutralizing influence of religion from all spheres of life; (i) changing nature of marriage from sacrament to contract; and (ii) having individual and not the

⁶⁰⁸ *Supra* chapter 3.

⁶⁰⁹ Coward, "India' Constitution and Traditional Presuppositions Regarding Human Nature."

⁶¹⁰ A prominent example of such scholarship is: Gerald James Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington and Indiana Pollis: Indiana University Press, 2001).

family as a sacred unit in society. It has not resulted into valorising traditional understanding of law which rejects pretensions of being based on individual will and on strict separation between law and religion.

And, scholars and activists reluctance to go beyond the above understanding about traditions has given rise to a situation where endorsement of culture means denial of rights to women.

5.2 Revisiting the Current Ways of Understanding the distinctions between Tradition and Modernity

In wide range of scholarship concerned with social change, with scholars attempting to take different stands for or against traditions or trying to transcend this opposition, it has not been brought to forefront that distinctions between tradition and modernity is not merely about differences between two such worldviews where one accepts rights and other rejects it. The distinction is also not about accepting or rejecting the idea of individual autonomy and growth or the values equality and fairness. For many non-western traditions, such as Hindu traditions in India, at a deeper conceptual level, differences with modernity or the West is more about relating to different perceptions about relationship between individual and the universe.⁶¹¹

For example, for Hindu traditions, as Menski points out in great detail, one of the most vital elements is the concept of cosmic order which embodies specific understanding about the relationship between an individual and the Universe.⁶¹²

For Hindu traditions, like for many non-western traditions,⁶¹³ difference with modernity is not about whether to accept ‘distinctiveness of human beings’ vis-a-vis other elements in the Universe. The point of difference is also not only about whether a society or culture or legal system should ensure human beings freedom to

⁶¹¹ Menski, *Hindu Law*. (At pp.86-93)

⁶¹² *ibid.*

⁶¹³ Chiba, *Legal Pluralism*. Chiba discusses in detail Japanese way of thinking, and uses the terms such as ‘pre-modern like’ or “amoeba-like way of thinking” for it. Challenging the opposition between tradition v modernity for making sense of the Japanese way of thinking Chiba argues, “Its character and factors cannot be labeled nor classified by such a simple dichotomy as ‘traditional vs modern’.” (At p. 22)

choose one's own identity or not. The issue is also not about whether or not to perceive every human being as an end in himself or herself. For example for traditions embodying the concept of cosmic order differences with modernity would hang on some other major differences such as: whether to accept or reject the vision of a cosmic order where every human being is to be seen as a part of a pre-existing cosmic web, to which he or she is connected in myriad ways through family, caste, community, religion etc..⁶¹⁴ The difference is also about whether to accept or reject the idea of what has come to be addressed as "humanist conception of humankind as a privileged site of truth"⁶¹⁵ - the idea of superiority of human beings over other elements in the Universe.⁶¹⁶ The differences are also about whether to perceive universe as divided into distinct spheres of religious and secular or to endorse the ideas of universe consisting of visible and invisible spheres and that of 'inevitable interconnectedness' between these spheres.⁶¹⁷ The concern is about establishing the

⁶¹⁴ Menski, *Hindu Law*. (At p. 90)

⁶¹⁵ Gray, *Enlightenment's Wake*; (At p. 155)

⁶¹⁶ For dominance of what has come to be known as "anthropocentric worldview" with the emergence of modernity see Santos, *Toward a New Common Sense*. Santos states,

In modern science the separation between nature and human beings is total. Nature is mere extension and movement; it is passive, eternal and reversible; it is a mechanism whose elements can be disassembled and then put together again in the form of laws; it possesses no quality or dignity which impedes us from unveiling its mysteries; such unveiling, furthermore, is not contemplative, but quite active, since it aims at knowing nature in order to dominate and control it. In Bacon's words, science will make of humanity "the master and owner of nature". (At p. 13)

Also see Nandy, *The Intimate Enemy*. Referring to wars in 21st century Nandy states

The drive for mastery over men is not merely a by-product of a faulty political economy but also of a worldview which believes in the absolute superiority of human over the nonhuman and the subhuman, the masculine over the feminine, the adult over the child, the historical over the ahistorical, and the modern or progressive over the traditional or savage..... The ancient forces of human greed and violence, one recognizes, have merely found a new legitimacy in anthropocentric doctrines of secular salvation, in the ideologies of progress, normality and hyper-masculinity, and in theories of cumulative growth of science and technology. (At p. x)

Douzinis, *The End of Human Rights*. Drawing attention towards "anthropocentric view" Douzinis point out,

No limits can be seen to restrain humanity's ability to assert its power over nature and continuously rewrite the boundaries of the world. (At p. 188)

Douzinis further mentions at another place,

Our whole anthropocentric universe has been built on the assumption that the subject is morally responsible for his freedom and legally liable for his actions. The law must disregard motives and circumstances, which introduce external determinations, in order to support the foundation stone of our epoch, the claim that free will is the dominant principle and the subject the master of his fate and the world. (At p. 240)

⁶¹⁷ Menski, *Hindu Law*, 2003. (At pp. 86-92)

understanding that every action as well as inaction of human beings has consequences not only for immediate visible spheres of family or community but also for invisible spheres. For non-western cultures an important point of distinction with modernity, furthermore, is not about whether a human being is endowed with faculties of reason and choice or not. The difference, instead, is whether the distinct faculties of human beings- the faculties of reason and choice- are to be perceived by individuals as means to impart higher moral responsibility towards their surroundings or to exercise moral sovereignty and dominance. The issue is whether the distinctiveness of human beings in possessing faculties of reason and choice are to render every human being as a 'being of desires'- the master of the Universe, the one who is in position to mould the surroundings as per his or her will or desire, in his or her own interest, without any requirement of reflecting on impact of his or her actions on the surroundings. Or else, endowed with the above faculties every human being is to be perceived as an entity who understands his or her position in the web as only one element in the symbiotic order, the one who is endowed with a higher responsibility for serving the 'interconnectedness'- to maintain the symbiotic balance in natural and social order.⁶¹⁸ For non-western traditions like Hindu traditions, the main concern is to ensure that each human being understands his or her high moral responsibility in using faculty of choice and reason.⁶¹⁹ Human dignity, many non-western traditions believe, lies not merely in a 'being of desires' as a self-interested being, but more so in realizing, that human beings possessed with faculty of reason and choice owe greater responsibility towards the cosmic web, or in serving the 'interconnectedness' that one is born in.

Rejecting the idea of privileging 'humanist conception of humankind',⁶²⁰ for traditions in India, like for many non-western traditions, discord with modernity is more about resistance towards any such worldview and the normative order which seem to be encouraging every individual to perceive himself or herself as an

⁶¹⁸ *ibid.*

⁶¹⁹ *ibid.*

⁶²⁰ Douzinas, *The End of Human Rights*. Douzinas note,

Man enters the historical scene by philosophically severing his ties with family, community, kinship and nature and by turning his creativity and wrath against tradition and prejudice, all that created, nourished and protected him in the past. (At p. 187)

‘unencumbered being’,⁶²¹ as such an independent autonomous individual, who is unbound by any context, relation or external authority.⁶²² Resistance is towards the idea of any normative order which promotes human beings to perceive themselves as beings at the center of universe- a human being as sovereign being, a being of desires, which is superior to other animate and inanimate beings in the cosmic order. One of the important points of difference is about expectations in non-western societies from different normative orders, social, moral, religious, or even legal order to make individuals understand one’s position in the cosmic web and to find ways to ensure that every individual understands the importance of making contribution for sustenance of the web. The point of difference with a modern, western culture would be about that social order where role of the State and legal system is reduced merely to some tools meant for ensuring freedom for individuals,⁶²³ to allow individuals to impose their desires on other individuals⁶²⁴, subject to only one constraint, allowing same freedom to others. For non-western societies, the main concern is not about whether a society should leave individuals free to choose one’s own way of life or not. The main concern instead is what should be role of the state, the legal system, or society in facilitating growth of every individual.⁶²⁵ The concern in other words is what should be role of the state or

⁶²¹ Douzinas., “The Universal man of the declarations is an unencumbered man, human, all too human.” (At p. 187)

⁶²² *ibid.* Highlighting the main differences even between modern and pre-modern Douzinas write, While classical and medieval natural law expressed the right order of the *cosmos* and of human communities within it, an order that gave the citizen his place, time and dignity, modernity emancipates the human person, turns him from citizen to individual and establishes him at the center of social and political organization and activity. The citizen comes of age when he is released from traditional bonds and commitments to act as an individual, who follows his desires and applies his will to the natural and social world. (At p. 20)

⁶²³ *ibid.* Douzinas states, Unfortunately political philosophy has abandoned its classical vocation of exploring the theory and history of good society and has gradually deteriorated into behavioural political science and the doctrinaire jurisprudence of rights. (At p. 7)

⁶²⁴ *ibid.* Douzinas write When nature is no longer the standard of right, all individual desires can be turned into rights. From a subjective perspective, rights in postmodernity have become predications or extensions of self, an elaborate collection of masks the subject places on the face under the imperative to be authentic, “to be herself”, to follow her chosen version of identity. Rights are the legal recognition of individual will. (At p. 11)

⁶²⁵ Derrett, *A Critique of Modern Hindu Law*. Writing in the decades soon after independence Derrett rightly described role of the State in India as he stated

society in guiding individual in developing one's own identity. Should an individual be left on his or her own to find one's way, to determine one's destiny? The doubt is with respect to the idea- "One who is master of one's own destiny is also responsible for it"!!!!⁶²⁶

From the view point of non-western traditions, what may be problematic is the idea of society where only state based normative order is privileged as progressive, as being in favour of individuals and other social, religious or culture based normative orders are labeled as backward or against individuals.

For a worldview which nurtures vision of interconnectedness between every individual and his or her surroundings, what is alien is the idea of a human being seeking rights to break free of this interconnectedness.⁶²⁷ Those traditions which perceive every individual as integrally connected to family or community the foreign element is: the idea of opposition between family or community and individual. For a worldview which perceives institutions of marriage and family, society, community etc as means for every individual's worldly and spiritual growth, the foreignness lies in the assertions that family or community being constraints in one's growth. What is new to such a worldview is the vision of individual existing

The Hindu believes that the individual has a right to follow his chosen path to salvation, and that salvation is natural right of the individual. His brief appearance in this phenomenal world should be regulated by the State in such a way as to enable him to reach that goal, consistently with the right of his contemporaries to do the same by their own chosen paths. The belief is a fact, not a fancy. To ignore this belief is to fail to implement a moral value operative amongst Hindus. (At p. 37)

For an apt description of differences between western and non-western law also see Rouland, *Legal Anthropology*. (At p. 115) (f.n. 11)

⁶²⁶ Douzinas, *The End of Human Rights*.

Modern will knows no theoretical but only empirical limits. It is the absolute power of choice, an indivisible sovereignty of the self. This power finds its perfect expression in decision. In making a decision, the self becomes an agent, an autonomous responsible subject, whose mark is found in his external manifestations, those actions that can be imputed on him. (At p. 190)

Referring to Kant Douzinas mention,

[Kant] wanted to show how freedom and reason are inseparable in their common concern to enlighten man and release him from his self-incurred tutelage, his "inability to make use of his understanding without direction from another". (At p. 191)

⁶²⁷ For prevalence of similar views even in the western context see Minow, "Forming Underneath Everything That Grows: Towards a History of Family Law."

separate from or apart from family and/or community and seeking protection or rights against the very institution of family or marriage.⁶²⁸

Resistance towards rights discourses is more about resisting those discourses which reject the very idea of human being as a part of 'pre-existing cosmic web' as anti-human, as the main constraint in growth and development of individuals. It is about rejecting the idea of rooting rights for an individual merely on the will or desire of the individual, and the possibility to enforce these rights through instrument of law as the only means for establishing relationships between individuals.⁶²⁹ According to Hindu worldviews decisions about rights and obligations are not solely dependent on the will of the individuals. Requirements of given reality or perceived Order also provide basis for such decisions. Constraints are justified when perceived to be necessary for maintenance of harmony in the society or the group. A person may be obliged to perform an action with respect to B not only for the reason that B has a right to it, but also because of action's righteousness with respect to the demands of a given reality. Therefore importance of A's action lies in the action's intrinsic relevance as well as in the fact that its performance results in satisfaction of B's entitlement.⁶³⁰

⁶²⁸ For challenge to such a vision of opposition between family and individual even in western context see Minow. Challenging the idea that family laws in the West have moving ahead on a linear path towards progressive individualism Minow writes

The conception of the self as a member of a family, with duties, entitlements, and commitments associated with this position, provides a continuous reference point for the historian of the family, and a counterpoint to conceptions of the historical subject as an independent person, standing alone before the state. For individuals, in history, this conception of themselves as family members could be a means for innovation as particular people tried to translate new experiences in terms of established family roles. (At p. 867)

⁶²⁹ David Lyons, "Introduction," in *Rights*, ed. David Lyons (California USA: Wadsworth Publishing Company, 1979), 1–13. Highlighting importance as well as limitations of Rights Lyons noted,

Rights go beyond mere favors and privileges. One cannot claim a right to others' kindness, to their unselfish sacrifice, or to their compassionate benevolence. There are two sides to this important truism. Rights do *not* secure all that is valuable in human relations (that is, the world would be a much sadder place without human sympathy). But rights concern what we *can* rightfully claim. (At p. 12)

⁶³⁰ Donnelly, *The Concept of Human Rights*. Donnelly exemplifies clearly opposition with the notion of rights considered appropriate for human rights discourse as he stated,

When A has a right to x with respect to B, B is obliged by 'right', and his obligation is primarily to a person (to A). Here the intrinsic nature of x is a secondary consideration; B's obligation arises primarily from the fact that A *has a right* to x, and therefore is owed x (emphasis original). (At p. 4)

For non-western traditions, one of the main points of contention with rights discourse is: the idea of separating rights from the right or the *righteousness*.⁶³¹ The objectionable part is the idea of reducing rights as a means to impose one's desires on the surroundings- on the family, community and culture or to liberate oneself from the constraints of religions, community, family.

For many non-western traditions which perceive contribution of every individual essential for maintenance of cosmic web, resistance to rights discourse involves resisting that idea of a society where possession of 'legally enforceable right' by a fellow individual is the only reason for the other individual or individuals to fulfil his or her duty. For Hindu worldviews, which nurture vision of cosmic order or social order as a form of symbiotic co-existence between individuals and other elements, more often than not, duty or duties pre-exists a right or rights.⁶³² Considering performance of one's own duty (*svadharma*) as essential for maintaining balance in cosmic order, rights often are the claims resting with individuals which needs assertion and enforcement as and when there are disturbances or imbalances in symbiotic nature of co-existence. Rights, in other words, are more a means for correcting the imbalance in the symbiotic order rather than merely being means for fulfilment of one's desires, interests or preferences. Rights could be the means to make a claim when the religions, cultures, communities, or families become unreasonable obstructions in one's search of identity.

⁶³¹ For a discussion on the issue see Douzinas, *The End of Human Rights*. Douzinas state

The replacement of the idea of a right according to nature by natural and human rights which, as attributes of the subject, are individual and subjective and can hardly establish a strong community. A society based on rights does not recognize duties; it acknowledges only responsibilities arising from the reciprocal nature of rights in the form of limits on rights for the protection of rights of others. (At p. 10)

Douzinas further state at another place in his work,

A rights based legal system, places the subject at the centre and reflects and enforces his powers, faculties or desires. Right is a public capacity given to the individual to allow him to attain his private objects of desire. These subjective capacities have no inherent limitation and it is only when they come across the same rights of others that boundaries are erected. (At p. 241)

⁶³² *Supra* chapter 2

For many non-western cultures challenge to human rights discourse may be more about rejecting or questioning that worldview which encourages every individual to perceive marriage, family, community, society, religion as nothing more than arbitrary and oppressive external constraints on will of the individual, as mere obstructions in exercise of autonomy by every individual, or as mere obstacles in growth and development of individuals. For a worldview which perceives every individual interconnected with its surroundings in myriad ways to visible and invisible spheres, which perceives institutions of marriage and family, society, community etc as means for every individual's worldly and spiritual growth, or as ways to serve the 'interconnectedness' what is highly objectionable are the assertions of family or community or other relations being sources of sexual, moral or economic oppression of women or family or community being constraints in one's growth. What is foreign for such a presumably 'traditional' worldview is the vision of individual existing separate from or apart from family and/or community and seeking protection against the very institution of family or marriage.⁶³³ Moreover, for a world view which promotes *atmanastushti*⁶³⁴- satisfaction of individual conscience as one of the important sources of *dharma* and encourages every individual to discover his or her own way to contribute to the interconnectedness, what is foreign is the assertion that there is no scope for exercise of human agency in Hindu traditions. For a worldview which considers contribution of each and every element essential for sustenance of cosmic order, as much as for the social order, what are foreign are not the ideas of autonomy or individuality of human beings. Instead, the primary concern for most cultures is to ensure that every human being finds ways to develop one's individuality not by seeking separation

⁶³³ For applicability of such ideals also in western context too see Minow, "Forming Underneath Everything That Grows: Towards a History of Family Law." Minow mentions,

The content of women's struggles—the search for a new ethos of social responsibility—suggests a counterweight to the story of increasingly autonomous individualism suggested by the traditional history of family law. Women acting through their claim to domestic virtue sought to inject family values—both with caretaking and moral reform elements—into law. Perhaps their efforts constructed a vantage point for criticizing autonomous individualism. If the formal family law that emerged bore too great a concern for family members as separate individuals, and was too little concerned with issues of social connection between family members and others, women's organizations addressed human needs and interdependence, and sought to connect the vulnerable with the strong. (At p. 882)

⁶³⁴ *Supra* chapter two

from the community or family. The aspiration is to ensure that every individual finds opportunity to develop individuality while being part of 'interconnectedness'. In name of modernization, what is problematic is an highly individualized, impoverished society where every individual is seen to have only two duties- duty towards one's own self and duty towards state- duty towards one's own self⁶³⁵- to protect one's own interests and duty towards state because the state promises safety, security, privacy to protect those interests.

Also, what may appear as resistance to the State and formal legal system, is not so much resistance to a new concept of law or to a concept of law which embodies idea of equality, liberty and human dignity. From the stand point of non-western societies, what may be problematic would be idea of society which has state based adversarial legal system as the only system for resolution of disputes between people.⁶³⁶ What is further problematic is idea of a society where state and its legal system consider community's concern for maintaining Order as backward and oppressive. What is problematic is idea of society governed, regulated or controlled by only one set of norms arising from the State and where all other normative systems, social, cultural or religious are to be seen as anti-individual, anti-women and oppressive.⁶³⁷

⁶³⁵ Derrett, *Religion, Law and the State in India*.

⁶³⁶ For a detailed discussion on this issue see Kalindi Kokal, "Renditions of Balance: (Unspoken) Dialogues with State Law in Dispute Processing in Rural India" (Martin Luther Universitat, 2017) ; Also Solanki, *Adjudication in Religious Family Laws*.; Nidhi Gupta, "Shariat Courts- Institutions with Laudable Objectives and Illegal Decisions," *Supreme Court Cases (Journal Section)* 7 (2014): 28–34.

⁶³⁷ Estin, "Unofficial Family Law." Arguing in favour of 'multilayered normative orders' Estin states,

There are important reasons to facilitate multicultural accommodation in family law. All individuals are embedded in families and communities, which are important to their stability, happiness, and to the successful nurture of the next generation. A multilayered approach to family regulation builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties. It supports a richer notion of citizenship in which individuals are understood not only in terms of their relationship to the state, but also as members of families and religious communities. (At p. 452)

5.3 Sensitivity towards Indigenous Traditions: Implications for Rights Discourses in India

Sensitivity towards non-western traditions is an important requirement for rights and legal discourses in all parts of the world. However, this requirement, as the above discussion has highlighted, is not about accepting or rejecting the ideas of women's empowerment and 'social change'. Sensitivity towards non-western traditions, may, in contrast, mean questioning meanings of the above terms. For non-western traditions resistance to women's rights discourses is not about rejecting the idea of women's dignity or relevance of humanistic values for women. Nor does it may always mean giving up efforts for legal reforms which address various cultural and religion based practices, which may be turning out to be oppressive for women. This resistance is not merely a resistance to the idea of ensuring range of legal rights to women for their economic empowerment or to protect women from abuse and violence in and outside family or to ensure women livelihood outside the sphere of family. Instead, resistance to human rights or women's rights discourses mean questioning or rejecting those discourses for legal reforms to grant rights to women, which carry the pretension of arising from a legal system which embodies strict separation between religion or culture and law. Moreover, it may be resistance to those discourses, where every instance of legal reform, which grants rights to women, is used as an opportunity to establish 'anti-women nature' of religions or indigenous traditions, of the institutions of marriage and family and to show prevalence of customary laws or influence of religion and traditions on law as signs of backwardness.

As discussed in the previous section, resistance to rights discourse involves questioning that limited idea which restricts women's empowerment to a society where individual is seen to have only two duties, towards oneself and towards State. It is also about rejecting feminists' vision of an empowered woman as one who protects individual autonomy by seeking rights against the family, community or society in favour of a vision which perceives empowered woman as one who is interconnected in a myriad ways with self and with family, community, religion, region, state and nation and who seeks rights to serve this interconnectedness, albeit

in one's own way. The debate between indigenous traditions and women's movement has also been about resisting those feminists ideas which consider traditional institutions of marriage and family as sites of oppression in favour of those ideas which consider these traditional institutions as means of individual growth.

Women's rights discourse which can be considered sensitive to Hindu traditions would be those discourses which uphold idea of a society where individual, far from being a central element, is seen as just one element in universe, connected in myriad ways to every other element. It is to be a movement which would support a legal and political system which respects the understanding that there is an inevitable interconnectedness between individuals and entities like family, religion, community, culture, and which encourages every individual to have duty towards one's own self; towards the above-mentioned entities and also towards the State. Discourses sensitive to Indian traditions can be those which takes cognizance of the concept of cosmic order and the idea of inevitable inter-connectedness between each individual and the Universe⁶³⁸, and which is sensitive towards the idea of importance of every individual's contribution in maintaining social order as well as the cosmic order.

In Indian context, women's movement which is sensitive to cultural diversity would mean a movement which is sensitive to a cosmo vision:

- which encourages every individual to understand that he or she is part of a complex pre-existing cosmic web and is integrally related in myriad ways to family, community, religion, region, state, nation and ultimately the cosmic order and that there is a symbiotic co-existence between every individual and the above-mentioned diverse entities;
- which expects every individual to deploy faculty of reason and process of critical reflection to understand his or her position in the cosmic web and responsibilities associated with that position;

⁶³⁸ *Supra* chapter 2.

- which considers social order as one with natural order and expects every individual to understand that performance of one's own duty, *svadharma*, is the way to maintain order in the micro-cosmic spheres of family, community, and ultimately in the larger macro-cosmic sphere;
- which encourages every individual to understand that although maintenance of order requires conscious efforts on part of every individual, the universe is a self-controlled order, and that it consists of in-built visible and invisible mechanisms for its maintenance that involves gods, men, animals and all other beings. Therefore, the worldview encourages every individual to understand that deviations from *svadharma* bring consequences not only in this life but also in subsequent lives.

Sensitivity towards above features would in turn mean concern for the situation where the state and its legal system play a supervisory role to support the idea of society as a 'self-controlled order'. This in turn, would mean a system which makes efforts to enable every individual to serve the interconnectedness, to perform one's '*svadharma*', to participate in one's own growth and in growth of fellow beings and also to contribute in growth of entities such as family, religion, culture or community. Conception of law and rights would be sensitive to and take into account the diverse and complex ways in which individual and religion, community or culture are interconnected to each other and contribute in growth of each other.

In other words women's movement in its re-conceptualised form will make a clear departure from the existing practices of engaging with religion, cultures or traditions only to understand the diverse ways in which religions or traditions oppress women. Instead, scholars will engage with indigenous traditions in order to appreciate diverse ways in which these traditions contribute in growth of women, in upholding dignity of women or in facilitating the task of discovering one's own identity. Further, women's movement with harmony towards traditions will be sensitive towards the idea that any individual has a duty not only towards self, but also towards family, community, culture and religion and that one of the important basis of upholding these duties is satisfaction of individual conscience. In its new version- a version which is sensitive towards non-western traditions, it would be required that

scholars and activists understand rights as means available with individuals to make claim as and when there are disturbances in symbiotic nature of interconnectedness or where religion, community or cultures become hindrances in growth of individual. Law and rights need to be seen as means to ensure first, that religion, community or culture contribute in growth of individual and second, that every individual also contributes appropriately in promotion and protection of religion, community or culture. And, what is appropriate may differ from situation to situation.

Sensitivity towards Hindu traditions will require bringing to forefront the idea that *dharma* does not have element of coercion inherent in it. What is needed are the efforts to bring to forefront elements, such as, ideas of self-controlled order, and of *atmanastushti* as a source of *dharma*, which militate against the assertion that *dharma* signifies passive submission to a set of given norms. What also needs to be brought to forefront is the fact that while maintaining Order is one of the primary concerns, passive submission to a set of given norms to seek maintenance would be against the spirit of Hindu traditions.⁶³⁹

It is true that Hindu traditions give more emphasis to the role of women as wives and mothers. There also exists extensive Hindu literature which provides detailed guidelines about obligations and duties of women as wives and mothers. However, deeper engagement with traditions, with the concept of cosmic order and elements associated with it, also highlights the fact that valorization of above roles cannot mean relegating women to above roles against their wishes. A worldview which seeks satisfaction of individual conscience as a basis for serving interconnectedness cannot justify sexual, moral or economic oppression of women. While marriage of daughter is a religious duty of father or natal family of a woman, however there are enough elements in Hindu traditions which militate against the assertion that the said religious duty equals to “marrying away daughter at any cost”.

Sensitivity towards traditions requires taking cognizance of the broad understanding of the conception of marriage which has been prevalent in pre-colonial India. There

⁶³⁹ *Supra* chapter 2.

is also need to consider that emphasis on the institutions of marriage and family, preference to monogamy as an ideal, do not exclude giving rights to those women who choose not to be part of one specific form of relationship considered ideal. Sensitivity towards traditions does not have to mean using instrument of law to impose certain pre-determined identities on individuals, especially on women. It certainly does not mean constraining any woman to the pre-determined role of a wife and or a mother much against his or her wishes and desires.

Indeed, there is a need to have extensive debate on to what extent state should regulate the domain of marriage and family. There is a range of questions relating to institution of marriage and family, which are being debated also in the western countries where marriage is presumed to have been completely secularized. Rights and duties of individuals in intimate relationships are an issue of debate universally. While it is largely accepted that marriage is a contract, nature of marriage contract is still a matter of discussion.⁶⁴⁰ West, where women are presumed to have acquired equality, is also debating the issues such as to what extent marriage or intimate relationships between individuals are to be governed by the State.⁶⁴¹

⁶⁴⁰ “Marriage as Contract and Marriage as Partnership: The Future of an Antenuptial Agreement.” This review draws attention towards a development called ‘covenant marriages’ in some jurisdictions. This development is an interesting shift away from ‘no-fault divorces’, and brings home the point that continuing use of binary of sacrament v contract for discussing marriage reforms is not really beneficial for the cause of women’s rights. Also see Dubler, “Wifely Behaviour: A Legal History of Acting Married.” Dubler drew attention towards continuing importance of institution of marriage in United States despite the fact that the laws in the different states do grant rights to women in various kinds of non-marital relationships. For importance to institution of family in UK see Andrew Bainham, “Family Law in a Pluralistic Society,” *Journal of Law and Society* 22, no. 2 (1995): 234–47. Also see David L. Chambers, “The ‘Legalisation’ of Family: Towards a Policy of Supportive Neutrality,” *Journal of Law Reform* 18, no. 4 (1980): 805–28. Also see Jens-Uwe Franck, “So Hedge Therefore, Who Join Forever: Understanding the Interrelation of No-Fault Divorce and Premarital Contracts,” *International Journal of Law, Policy and the Family* 23 (2009): 235–76. Jen-Uwe deconstructs the idea of marriage as contract as he mentions,

One should bear in mind that future spouses enjoy only a very limited contractual freedom to agree on conduct during the marriage; in particular, no jurisdiction permits couples to negotiate away from the obligation of spousal support during marriage. The duty of marital solidarity during marriage remains sacrosanct to the parties. Contractual freedom is essentially limited to agreements on the financial consequences of divorce. However, as will be further explored in turn, such agreements may serve as corrective to some of the problematic effects of the availability of no-fault divorce. *Therefore, their enforceability should not be interpreted as a further weakening of the sanctity of marriage.* (emphasis added) (At p. 253)

⁶⁴¹ For scholars expressing concern over increasing trend of ‘private contractualisation of marriage’ see Jr Witte John, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 1. Ed edition (Louisville, Ky: Westminster/John Knox Press, U.S., 1997). Expressing

Sensitivity towards traditions would not mean relegating individuals to a situation where individuals are denied freedom of choice- freedom to choose one's own identity. It also does not mean accepting denial of rights to women to exercise choice in name of religion or customary practices.⁶⁴² As Puniyani rightly suggests it is indeed time to wake up and ensure that women do not suffer injustice or oppression in name of religion or customs.⁶⁴³ In contrast, sensitivity towards tradition would mean taking due cognizance of the fact that seeking passive submission to certain pre-determined roles can be done by ignoring one of the main concepts of Hindu worldview, the concept of *atmanastushti* (satisfaction of individual conscience)- a concept of central to Hindu world view. While 'interconnectedness' and requirement of serving the interconnectedness are given great importance in Hindu worldview, and institution of marriage and family are important means to serve the interconnectedness, the concept of *karma*, rules out possibility of coercive imposition. It would also not mean relegating women to pre-

concern about weaker position of women and children in marriage relationships even in the United States Witte noted,

In the heady romance of budding nuptials, parties are often blind to the full consequences of their bargain. In the emotional anguish of separation and divorce, parties can be driven more by the desire for short-term relief from the other spouse than by the concern for their long term welfare or that of their children. The economically stronger and more calculating spouse triumphs in these contexts. And in majority of these cases today, that party is still man, despite the loud egalitarian rhetoric to the contrary. (At p. 214)

Witte expresses serious concern over changing nature of intimate relationships as he writes,

The early Enlightenment ideals of marriage as a permanent contractual union designed for the sake of mutual love, procreation, and protection is slowly giving way to a new reality of marriage as a "terminal sexual contract" designed for gratification of the individual parties. (At p. 207)

Also see Mary Ann Glendon, *The Transformation of Family Law - State, Law, & Family in the United States & Western Europe*, 2nd edition (Chicago: University of Chicago Press, 1989). Also, Estin, "Unofficial Family Law." Taking note of feminists demands for protecting rights of women in pluralistic forms of intimate relationships Estin states,

Beyond the argument for a pluralized marriage law, other writers have argued for abolishing or "privatizing" marriage law. These proposals sometimes suggest that civil marriage should be replaced with civil union or another substitute regime, and sometimes suggest that a status approach should be entirely rejected in favor of general principles of contract, property, and tort law. Advocates of privatization sometimes argue that these alternatives would give greater scope to the unofficial law of religious communities. As with a pluralization of marriage law, however, the state would remain involved in family regulation in either of these scenarios. Most discussions never reach the more specific, pragmatic questions of how a system of pluralized or privatized marriage could be implemented. (At p. 453)

⁶⁴² Puniyani, "A Doll's House."

⁶⁴³ *ibid.* (At p. 3975)

determined roles of wives and mothers. In contrast, sensitivity towards traditions may mean efforts to ensure that valorizing role of women as wives and mothers does not result into de-valorisation of single women or the women who have not been willing to adopt that role or stay in that role.

Sensitivity towards tradition would mean giving up the practice of constructing a negative view of culture or religion, which relegate cultures and religions in the realm of arbitrariness or irrationality. Sensitivity towards traditions as well as concern for plurality would mean giving space to those views which do not perceive institutions of marriage and family as sites of oppression of women.⁶⁴⁴ Sensitivity lies in taking cognizance of the fact that institutions of marriage and family are important for different people including women in different ways.⁶⁴⁵ These institutions vary from being religious, spiritual institutions for some to merely being merely socio-economic institutions for many others. For some, based on religious or spiritual perspective, marriage or family life is an essential stage in life or an important means for enjoying worldly pleasures in combination with fulfillment of religious or spiritual obligations. It may be a means to fulfill one's religious as well as worldly obligations towards people one is connected with by birth, whereas for many others it may be an institution to provide stability in society or else, merely an institution for economic support of many, far and beyond those who are related to each other by consanguinity and marriage.

Concern for cultural diversity would require space for those worldviews where community, religion or institutions of marriage and family are means to ensure an individual's spiritual and worldly growth. Sensitivity towards traditions would further mean creating space for those views where claiming rights is not a way of making claims against family, community or religion. Concern for plurality requires

⁶⁴⁴ Siobhan Mullally, "Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case," *Oxford Journal of Legal Studies* 24, no. 4 (2004): 671–92. Mullally presents a strong case for giving freedom to women to interpret religion

⁶⁴⁵ For support to such view even in Western context see Minow, "Forming Underneath Everything That Grows: Towards a History of Family Law." She stated,

Just as study of the history of family law should encompass family members' economic interdependence, and intercorrelated roles, the future of family law too will involve the continuing interplay between autonomy and dependency, collectivity and individualism. (At p. 894)

efforts for those views who do not necessarily perceive a conflict between religion and rights or culture and rights. Sensitivity would mean creating space for those who do not see their religion or culture as a source of oppression, who do not see religion or culture as requiring passive submission to given norms.

And, none of the above would mean giving up scholars' and activists' struggle for granting legal rights to women in and outside the domain of family. Sensitivity towards traditions also would not mean giving up the concern that every woman is treated as an end in herself and not just a means for well-being of family or community. There is also no requirement of giving up struggles for legal reforms with an aim to ensure that women have rights in the domain of family.

It would also not mean giving up struggle for creating a better world or a better society for women- a world or society where every individual can have freedom to choose his or her own way of life; a better world where the state and its legal system makes it possible for all to exercise a range of options- from being a member of family, community, religion to being an individual who does not claim allegiance to any of the above institutions; a world where women are not forced to be part of the institution of marriage merely for economic and social compulsions.⁶⁴⁶

If we look at the domain of marriage, sensitivity towards tradition or emphasis on sanctity of marriage and family does not have to mean- denying legal rights to women who: prefer to remain single; prefers partner of one's own choice irrespective of like or dislike of family and community; prefers to come out of the bond of marriage. It also does not mean belittling legal reforms which can underscore the importance of equality to women in and outside the domain of

⁶⁴⁶ Kim, "Towards a Feminist Theory of Human Rights." Kim pertinently points out,

Neither feminism nor gender oppression is endemic to the West. Rather, feminism is a multicultural response to the oppression of women. There is nothing inherently "Western" about it. Feminism does not impose Western values upon societies in non-Western countries; rather it opens up options that enable women (in both Western and non-Western countries) to become "cultural participants" rather than cultural victims. Feminism empowers women, thus enabling them to participate in the culture rather than simply being subject to it. By examining the place of women in society, feminism changes the cultural context in which women live. It provides a theoretical framework within which women can challenge oppressive cultural practices. Feminism shifts the focus of women from that of object to one of subject. The rhetoric of cultural relativism, by depriving women of their ability to challenge existing systems of domination, effectively forecloses any opportunity that women might have to fully participate in their culture. (At p. 49-50)

family. Sensitivity towards traditions does not have to mean that scholars and activists are not required to be vigilant towards those practices which deny of rights to women in name of religion or traditions.

Emphasis on sanctity of marriage and family does not have to entail an endorsement of the view that women have to be submitting themselves to a set of norms received from Heaven or personal beliefs of those powerful in society about proper roles of women as wives and mothers. It also does not mean denying women freedom to decide whether to choose marriage as a means for serving the ‘interconnectedness’ or making one’s contribution to society.

However, pursuing the above aims would undoubtedly require significant change in approaches by scholars and activists. It requires recognition that pursuing above aims may not result in achieving the kind of fundamental transformation in Indian society, which has so far been expected by scholars and activists since advent of colonial era.⁶⁴⁷ It requires taking cognizance of the fact that larger range of legal rights to women to choose their own way of life does not necessarily require devalorising institutions of marriage and family.

It will need taking cognizance of the fact that while for women’s rights scholarship increasing concern for pluralism or difference between women is a new development, finding balance between rights and cultural diversity is an old challenge for the Indian State, especially the judiciary in India. If we consider the issue of rights of women in intimate relationships, for Indian judiciary the challenge to protect rights of individuals who opt to be or happen to be part of relationships which were once considered backward and oppressive is not new.⁶⁴⁸ Judges in India have always been dealing with the issue of rights of women and that of other individuals who decide or happen to establish intimate, personal relationships without fulfilling formal, legal requirements, or by defying legal restrictions and prohibitions. There are a large number of cases where judges have taken steps to

⁶⁴⁷ *Supra* chapter 4.

⁶⁴⁸ For a detailed discussion on this point see: Pal, *Matrimonial Laws and the Constitution*.

protect the rights of such women who were in informal relationships,⁶⁴⁹ even in technically illegal and legally void relationships.⁶⁵⁰ However, for a long time socio-legal scholars in India either ignored such attempts by judiciary or simply dismissed them as examples of poor implementation of progressive laws by the judges. Till few decades ago scholars were of the opinion that judges' reluctance to strictly enforce progressive legislations or people's insistence on engaging in prohibited practices was a mere reflection of non-progressive, patriarchal mindsets prevalent in India.⁶⁵¹ It was then believed that these mindsets will ultimately change through activism, through a combination of strong legal measures and education. Gradually scholars' perception towards diverse kinds of intimate relationships has changed significantly.

With a significant shift in stance women's rights scholarship now perceives these instances of individuals- men and women- engaging in prohibited practices (and or relationships) as signs of progressiveness. Those women, who were once viewed as perpetrators by legal system as well as by women's rights scholars and were denied any kind of protection by law for being part of 'backward practices, are now seen by scholars as victims of the system. Judicial interventions for upholding diverse kinds of relationships which were once decried by the scholarship as steps in maintaining backwardness are now appreciated as efforts to accommodate plurality- to take measures to protect rights of women in diverse kinds of legal or illegal personal relationships. However, what has remained obscured even with this shift is the fact that for Indian judiciary, protecting rights of women in diverse relationships, has not been about devalorising institutions of family and marriage. It has remained unnoticed by scholars that for Indian legal system and judges in India, rights of women in polygamous or adulterous relationships can co-exist with perceptions of marriage as sacrament.

Moreover, while it is true that society in India and the legal system gives great importance to the idea of marriage as sacrament what is alien to many people is the

⁶⁴⁹ *Supra* chapter 4.

⁶⁵⁰ For details see Menski, *Hindu Law*. (especially chapter 8-12)

⁶⁵¹ *Supra* chapter 2.

idea of marriage as site of sexual, moral or economic oppression of people. It is true that perceiving idea of marriage as sacrament, a section of society has frowned upon the idea of divorce, or in traditional societies divorce may emerge only as a remedy rather than right. However, what is problematic is the understanding which equates or rather reduces the idea of marriage as sacrament to certain specified rituals and to just one element- indissolubility of marriage. What has been completely ignored is the fact that marriage as a sacrament has been an important means available with families/communities and now also with judges and the Indian legal system for imposing on every man or the whole marital family responsibilities or duties towards woman, even after dissolution of marriage.⁶⁵² Marriage as sacrament has been a means to ensure that idea of marriage as contract and importance to individual will do not become means for husband and marital family to escape responsibilities.⁶⁵³ While talking about equal legal rights to women in marriage or family, the issue is not whether to grant equality to women or not. Instead the cause of concern has been whether equality would mean reducing marriage to a mere equal exchange between two equally placed self-interested individuals who willingly

⁶⁵² Futility of opposition between sacrament and contract is evident from the way issue of women's rights to maintenance after dissolution of marriage has been debated in India. Indian family laws, especially Hindu laws, drawing on the concept of marriage tie as a sacrament, which cannot be severed for all purposes even after divorce, have had the concept of maintenance of woman. This concept imposes obligation on the marital family to maintain a woman (a wife or daughter in law) even after dissolution of marriage. In order to ensure effective enforcement, section 125 of the Criminal Procedure Code makes it possible to invoke criminal proceedings to seek maintenance from marital family. There has been an extensive debate in India about whether Muslim women can invoke above mentioned section to impose economic obligation of marital family. The Supreme Court of India, apparently unconcerned about the opposition between sacrament v contract, extended application of above section to Muslim women too in the famous case in 1984, *Mohd. Ahmed Khan v Shah Bano Begum*, 2 Supreme Court Cases 556 (Supreme Court 1985). However, the then ruling party yielded to political pressure and to assertions of marriage as contract for Muslims to pass a legislation focused on rights of Muslim which overruled the judgment of the Supreme Court. While act of the Center has been much criticized for giving into communal pressures, the special piece of legislation has ultimately been interpreted to protect economic rights of Muslim women.

⁶⁵³ Pal, *Matrimonial Laws and the Constitution*. Pal succinctly challenges the ill-conceived dichotomy of sacrament v contract as he notes,

But call it a sacrament, if you like, or give it any other pompous nomenclature, a Hindu marriage at least after the Hindu Marriage Act, must originate in a contract, though after solemnization, the relationship no longer rests *on contract alone*, but confers on the parties legal status with statutory rights and liabilities. As has been well said by Lord Simon in *Johnson v Morston* [(1978) 3 All ER 37] even though Sir Henry Maine was right, when he wrote his classical treatise "Ancient Law" in mid-Nineteenth Century, that the movement of progressive societies was from status to contract, there is now a reverse swing from contract to status. (emphasis original) (At p. 27)

assume certain rights and obligations through the instrument of contract merely to pursue one's own interests.⁶⁵⁴

For rethinking relationship between indigenous traditions in India and rights of women what needs to be brought to forefront are the understandings that *dharma* does not have element of coercion inherent in it. It may be required to draw attention towards the concepts of *atmanastushti* and universe as a self-controlled order, which rules out the requirement of using coercion to impose religion or religion related beliefs. So even if different individuals or groups, as per their status in society, may have different understandings or different levels of authority in society to lay down what is *dharma*, it would be against the spirit of the Hindu worldview- the concept of cosmic order- to use coercion- the power of the State to impose that understanding.

Sensitivity towards traditions does not require indifference, inaction, tolerance to intolerance. It is necessary to move forward, however, as Sinha pertinently pointed out,⁶⁵⁵

It is necessary to move forward, and that movement forward cannot be accomplished on the basis of the present single-catalog approach. Insisting upon this catalog, with its subsumptions of individualism, rights, and legalism, as the only possible means of human emancipation, leads us to two possible alternatives. One, we must ignore social order which are not based on individualism, rights and legalism. Two, we must force this conception of social order upon societies which are conceived differently. The first alternative has two consequences. On the one hand, it keeps most of the humanity outside its scope so that it really is incapable of relating to the

⁶⁵⁴ “Marriage as Contract and Marriage as Partnership: The Future of an Antenuptial Agreement.” Finding idea of marriage as contract not fully appropriate for the relationships of personal, intimate relationship this issue of HLR suggests a shift towards different conception of ‘marriage as partnership’. Menski, “Legal Pluralism in Hindu Marriage.” Describing Hindu marriage Menski writes,

The major concern is therefore not with the expectations of individuals *per se*, nor with those of a partially abstract legal entity like the modern state, but with the spouses as part of micro- and macro-cosmic constellations that force the individual to consider the needs and demands of others just as much as his or her own. (At p. 199)

⁶⁵⁵ Sinha, “Human Rights.” (At p. 89-90)

peoples of the non-western social orders discussed above. On the other hand, and conversely, by its inability to relate to these societies it enlarges the scope of injustice inflicted by their governments upon their peoples. The second alternative of enforcing the individualist-rightist-legalist conception of social order on the societies which have not cast in this mould is, in the first place, impossible..... What is required is a redefinition of the problem of human rights which would focus not so much upon a particular way of human emancipation but at the very issue of that emancipation, recognizing the fact that there are more than one way of achieving such emancipation. It is, therefore, necessary to separate the concept of human rights from any particular catalog thereof. What is universal is the former, not the latter.

One couldn't agree less with Sinha⁶⁵⁶ that 'a movement forward' is essential, inevitable. But if we really want to be sensitive to cultural and religious diversity, it would require a movement forward in the direction where it is accepted that the concept of human rights, with its tenets of rights, individualism and legalism is just one of the ways of protecting human dignity. It would require an understanding that different cultures in the world have had different ways of protecting human dignity with no claim for superiority over the other.⁶⁵⁷

Problem lies with our incessant efforts to push religion to the realm of arbitrariness, irrationality, passive submission or oppression.⁶⁵⁸ We have committed ourselves to the understandings of traditions offered to us by a handful of people. It is we the scholars who have been responsible for creating a situation where standing against

⁶⁵⁶ *ibid.*

⁶⁵⁷ Donnelly, *The Concept of Human Rights*. Emphasising human rights as only one of the ways of protecting human dignity Donnelly states,

If we are to try to assess whether human rights is a 'better' way to approach human dignity and organize a polity, we need to ask "Better than what?".... Human rights are not entirely ends in themselves; among other things, as we have seen, they are means to realize human dignity. To the extent that they have instrumental value, the merits of human rights can, at least in principle, be assessed empirically. I would suggest that for most of the goals of developing countries, *as defined by these countries themselves*, human rights are as effective as or more effective than either traditional approaches or modern non-human rights strategies. (At p. 85)

⁶⁵⁸ Volpp, "Talking Culture."

traditions is a cost that needs to be paid for claiming rights. Rights scholars have been concerned about the fact that women have been saddled with the burden of carrying the ‘traditions’. However, nothing seems to have been done to liberate them from this burden. Burden, on the contrary, is much more tedious. Allegiance to traditions needs to be given up for anyone claiming rights. There is no space for those who do not see conflict between culture and rights or religion and rights, for whom claiming rights is not a way of making claims against family, community, culture or religion.⁶⁵⁹ There is no space also for those for whom faith in institution of marriage and family is intact, despite being a survivor of familial violence.⁶⁶⁰ Rights discourse currently creates no possibility of freedom to have one’s own interpretation of traditions and culture.⁶⁶¹

⁶⁵⁹ For similar arguments see Minow, “Forming Underneath Everything That Grows: Towards a History of Family Law.”

⁶⁶⁰ An excellent example of such scholarship is: Oldenburg, *Dowry Murder*.

⁶⁶¹ A woman can remain a devout muslim or Hindu while choosing Special Marriage Act for marriage.

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